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## The Road to the Gettysburg Address

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# THE ROAD TO THE GETTYSBURG ADDRESS

ALFRED L. BROPHY\*

## ABSTRACT

*This Article recovers the forgotten ideas about public constitutionalism in seventy published addresses given at cemetery dedications from Supreme Court Justice Joseph Story's address at Mount Auburn Cemetery in Cambridge, Massachusetts, in 1831, to the addresses by Edward Everett and Abraham Lincoln at Gettysburg in November 1863. It reveals an important, but forgotten, set of ideas that provided a precedent for Lincoln's Gettysburg Address. Those addresses, including Lincoln's, reveal the centrality of constitutional values—as opposed to constitutional text—in framing Americans' interpretation of the Constitution. Pre-Civil War Americans had a vibrant public discussion of constitutional principles, in addition to constitutional text. These were ideas propagated on such diverse occasions as July Fourth celebrations, arguments in the Supreme Court, dedication of public monuments, lyceum addresses, and college literary society lectures.*

*For Americans, especially those of the Whig Party, the Constitution was a key component of culture and a key unifier of the nation. Cemetery dedications are one place where Whigs turned to promote their constitutional values. The cemetery supported constitutional values of Union, respect for property, and obedience to the rule of law. Rural cemeteries promoted Whig constitutional ideals about order, patriotism, and Union. Those values were at the center of the debate over the response to secession and they were put into practice by soldiers along Cemetery Ridge at Gettysburg in 1863. Lincoln's address at Gettysburg reflects the appeals to sentiment and Constitution that were so frequently invoked in the thirty years before the War. This hidden history reveals how those ideas mobilized support for Union and, thus, how public constitutional thought affected the actions of voters, jurists, and politicians.*

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I. INTRODUCTION: JUSTICE JOSEPH STORY  
AND THE MOUNT AUBURN CEMETERY

On September 24, 1831, Supreme Court Justice Joseph Story, in the beginning of his fifty-second year, spoke in front of thousands of Boston’s citizens at the dedication of the Mount Auburn Cemetery.<sup>1</sup> Mount Auburn, the United States’ first “rural cemetery,” had been in the making for several years. It was a joint venture of the Massachusetts Horticultural Society and a group of Bostonians who sought a more appropriate place for burials than the overcrowded downtown Boston cemeteries.<sup>2</sup> A private charitable corporation, the Massachusetts Horticultural Society, was organized for the public missions of the dignified burial of the dead, the preservation of their memory, and the elevation of those who visited cemeteries.<sup>3</sup> Story began his address with a statement about a natural law: the universal human respect for the dead and the desire to have a place of repose as well as veneration.<sup>4</sup> This was a principle common to humans throughout history, from the time of Egypt to Rome and Greece, to the present.<sup>5</sup> Such universal sentiments could serve noble purposes. “We should accustom ourselves to view [cemeteries] . . . as influences to govern human conduct, and to moderate human suffering,” Story suggested.<sup>6</sup> After visiting a cemetery, “we feel ourselves purer, and better, and wiser, from this communion with the dead.”<sup>7</sup> For Story thought—as

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1. JOSEPH STORY, AN ADDRESS DELIVERED ON THE DEDICATION OF THE CEMETERY AT MOUNT AUBURN, SEPTEMBER 24, 1831 (Boston, Joseph T. & Edward Buckingham 1831); *Rural Cemeteries*, 53 N. AM. REV. 385, 389 (1841) (commenting that thousands attended Story’s dedication address).

2. BLANCHE M. G. LINDEN, SILENT CITY ON A HILL: PICTURESQUE LANDSCAPES OF MEMORY AND BOSTON’S MOUNT AUBURN CEMETERY (rev. ed. 2007).

3. CATALOGUE OF THE LOTS IN MOUNT AUBURN CEMETERY: NAMES OF THE PROPRIETORS AND REPRESENTATIVES OF DECEASED PROPRIETORS, THE CHARTER, BY-LAWS, ETC. 13-16 (Boston, Austin J. Coolidge 1860) (charter of Massachusetts Horticulture Society); *id.* at 16-26 (act to “Incorporate the Proprietors of the Cemetery of Mount Auburn”); *see also Mount Auburn Cemetery*, 33 N. AM. REV. 397, 397-406 (Oct. 1829) (discussing *Report of the Massachusetts Horticultural Society Upon the Establishment of An Experimental Garden and Rural Cemetery*, in MASSACHUSETTS HORTICULTURAL SOCIETY 62-69 (Boston, Isaac R. Butts 1831)).

4. STORY, *supra* note 1, at 7.

5. *Id.* at 7-9.

6. *Id.* at 6.

7. *Id.* at 7.

did other people of his time, like Washington Irving<sup>8</sup>—that cemeteries might be turned from places of gloom to places of moral uplift. “Why,” he asked, “do we not enlist it with more persuasive energy in the cause of human improvement? . . . Why do we not make it a more efficient instrument to elevate Ambition, to stimulate Genius, and to dignify Learning?”<sup>9</sup>

The cemetery was part of a mission to teach people about the eternal life of the soul; that lesson was common to barbarians as well as Christians.<sup>10</sup> By visiting the graves of ancestors, individuals engaged in a sentimental project of learning from the past and interacting with it.<sup>11</sup> “[W]e gather up, with more solicitude,” Story said, “the broken fragments of memory, and weave, as it were, into our very hearts, the threads of their history.”<sup>12</sup> By removing graveyards from cities, where there was no opportunity to reflect on their lessons, where they were disturbed by commerce, and where they had to be gated to prevent further violation, and putting them in rural settings where people might visit them in quiet moments, Story planned to enlist cemeteries in “the highest purposes of religion and human duty.”<sup>13</sup>

In Justice Story’s mind, religion worked in conjunction with the Constitution, the government, and individual sentiment to create a godly, civilized nation. From his 1826 Harvard Phi Beta Kappa address that linked the common law to Christianity and those two together to moral and economic progress,<sup>14</sup> to his *Commentaries on the Constitution of the United States*,<sup>15</sup> through to his opinions on the Supreme Court,<sup>16</sup> Story’s world was one of moral duties that restrained vice, preserved the republic through patriotism and Christianity, and preserved property rights.<sup>17</sup>

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8. WASHINGTON IRVING, 1 THE SKETCH BOOK OF GEOFFREY CRAYON 225 (London, John Murray 1821) (“rural funerals”).

9. STORY, *supra* note 1, at 10.

10. *Id.* at 7-8, 10.

11. *Id.* at 13.

12. *Id.* at 7.

13. *Id.* at 13.

14. JOSEPH STORY, A DISCOURSE PRONOUNCED BEFORE THE PHI BETA KAPPA SOCIETY: AT THE ANNIVERSARY CELEBRATION ON THE THIRTY-FIRST DAY OF AUGUST, 1826, at 21-22, 24-25 (Boston, Hilliard, Gray, Little, & Wilkins 1826) (discussing the reforms of common law and of Christianity).

15. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray & Co. 1833).

16. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-22 (1842) (on nationalizing mission); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 583 (1837) (Story, J., dissenting); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 666 (1819) (Story, J., concurring).

17. R. KENT NEWMAYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 115-54 (1985) (discussing Story’s economic thought); *id.* at 155-95 (explain-

Americans learned about those constitutional values in many places. They heard about constitutional values in church pulpits,<sup>18</sup> in college literary societies,<sup>19</sup> and at gatherings of civic organizations.<sup>20</sup> The places where those sentiments of Union, economy, and law were put into action were legislative halls.<sup>21</sup> Story saw a unique ability of cemeteries to contribute to the mission of those related institutions. Cemeteries taught moral truths differently (and in some ways better) than anywhere else, for they spoke with a voice that everyone could hear. "They may preach lessons, to which none may refuse to listen, and which all, that live, must hear. Truths may be there felt and taught in the silence of our own meditations, more persuasive, and more enduring, than ever flowed from human lips."<sup>22</sup> Indeed, cemeteries spoke with an eloquence heard by everyone:

The grave hath a voice of eloquence . . . which speaks at once to the thoughtlessness of the rash, and the devotion of the good; which addresses all times, and all ages, and all sexes; which tells of wisdom to the wise, and of comfort to the afflicted; which warns us of our follies and our dangers; which whispers to us in accents of peace, and alarms us in tones of terror; which steals with a healing balm into the stricken heart, and lifts up and supports the broken spirit; which awakens a new enthusiasm for virtue, and disciplines us for its severer trials and duties; which calls up the images of the illustrious dead, with an animating presence for our example and glory; and which demands of us, as men, as patriots, as christians, as immortals, that the powers given by God should be devoted to his service, and the minds created by his love, should return to him with larger capacities for virtuous enjoyment, and with more spiritual and intellectual brightness.<sup>23</sup>

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ing Story's constitutional thought); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 103-10, 493-94 (1988) (discussing Story's constitutional thought).

18. See generally MITCHELL SNAY, *GOSPEL OF DISUNION: RELIGION AND SEPARATISM IN THE ANTEBELLUM SOUTH* (1997).

19. See Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. 1879, 1881 (2011); Donald M. Scott, *The Popular Lecture and the Creation of a Public in Mid-Nineteenth-Century America*, 66 J. AM. HIST. 791, 791-809 (1980).

20. See generally JOHANN N. NEEM, *CREATING A NATION OF JOINERS: DEMOCRACY AND CIVIL SOCIETY IN EARLY NATIONAL MASSACHUSETTS* (2008); DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776-1820* (1997); Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671 (2005).

21. See generally CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008); Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 333 (2011).

22. STORY, *supra* note 1, at 13.

23. *Id.* at 13-14; see also THE HISTORY, INCORPORATION, RULES AND REGULATIONS OF OAKWOOD CEMETERY, AT SYRACUSE, N.Y., TOGETHER WITH THE DEDICATION ODES AND

Cemeteries, thus, had a unique call on the mind, which fit with Story's desire to "use every possible incentive to human virtue."<sup>24</sup> Cemeteries exercised a sentimental pull because of the people buried there. They also caused people to reflect on life. The rural setting amplified their appeal to visitors' emotions. Mount Auburn was within sight of Boston, Harvard, and farms. Thus, "within our reach, every variety of natural and artificial scenery, . . . is fitted to awaken emotions of the highest and most affecting character."<sup>25</sup> The cemetery furnished a useful school for instruction. As the *North American Review* commented in 1841, "[T]he appropriate burial of the dead . . . is fraught with moral and religious uses, which the thoughtful will readily interpret."<sup>26</sup>

Story concluded with a call to "cultivate feelings and sentiments more worthy of ourselves, and more worthy of christianity."<sup>27</sup> Story's address tapped a well of cultural ideas. It also set the model for many addresses down to the Civil War, just as Mount Auburn set the standard for subsequent rural cemeteries.<sup>28</sup> Several books detailed the art and layout of Mount Auburn, and travel memoirs recorded the thoughts of visitors.<sup>29</sup> Within a few years, rural cemeteries were opening throughout the United States.<sup>30</sup>

This Article turns to the seventy dedication addresses<sup>31</sup> that were published from Story's Mount Auburn address in 1831<sup>32</sup> before Abra-

ADDRESSES, WITH OTHER PAPERS 27, 36 (Syracuse, J.G.K. Truair & Co. 1860) [hereinafter OAKWOOD CEMETERY] ("The graves of all the dead have myriad voices, that speak to the living with more than the eloquence of human lips.") (dedication speech of the Honorable William J. Bacon).

24. STORY, *supra* note 1, at 14-15.

25. *Id.* at 18; *see also* CAROLINE GILMAN, THE POETRY OF TRAVELING IN THE UNITED STATES 158-68 (New York, S. Colman 1838) (discussing visit to Mount Auburn); GILMAN, *supra*, at 158 (quoting STORY, *supra* note 1 *passim*); CAROLINE GILMAN, RECOLLECTIONS OF A SOUTHERN MATRON 80-82 (New York, Harper & Bros. 1838) (discussing funeral of slave, Jacques).

26. *Rural Cemeteries*, *supra* note 1, at 387.

27. STORY, *supra* note 1, at 21.

28. The *North American Review's* article on the Mount Auburn Cemetery, *Rural Cemeteries*, *supra* note 1, helped spread the word. When Laurel Hill opened in Philadelphia in 1838, Story's address was reprinted in newspaper articles about the new cemetery. *See Letters from Philadelphia, November 28th, 1838*, SALEM GAZETTE 2 (Dec. 4, 1838).

29. *See, e.g.*, JACOB BIGELOW, A HISTORY OF THE CEMETERY OF MOUNT AUBURN (Boston, James Munroe & Co. 1860); NATHANIEL DEARBORN, A CONCISE HISTORY OF, AND GUIDE THROUGH MOUNT AUBURN (Boston, Nathaniel Dearborn 1843); WILSON FLAGG, MOUNT AUBURN: ITS SCENES, ITS BEAUTIES, AND ITS LESSONS 6 (Boston, James Munroe & Co. 1861); JAMES SMILLIE & CORNELIA W. WALTER, MOUNT AUBURN ILLUSTRATED (New York, R. Martin 1847).

30. LINDEN, *supra* note 2, at 133-53 (discussing growth of rural cemeteries).

31. *See infra* Appendix, Published Dedication Speeches, 1831-1860.

32. *See generally* STORY, *supra* note 1.

ham Lincoln's November 1863 address at Gettysburg<sup>33</sup> to pull together the threads in the dedication addresses that are most directly related to constitutional culture of the pre-Civil War era. Those addresses reveal a constellation of ideas about the cemetery as a promoter of patriotic sentiments, which supported a constitutional republic. Those ideas included the reverence of the past, the promotion of an ordered republic that improved upon sublime nature, and the use of charitable corporations to promote public values.

This Article begins by locating the ideas of the Whig party about constitutionalism and their vehicles for promoting those ideas, from oratory to judicial opinions and situating the data here in the secondary literature on public constitutionalism, which has recently expanded the boundaries of "constitutional law." Part III excavates the constitutional and political ideas in the dedication addresses. Those orators saw cemeteries as part of the establishment of order through public and private co-operation. The cemeteries were places of order and of private action for public good, which brought the republic together to recall the past and learn about the future. They were an articulation of the Constitution's mission of creating an ordered republic. Part IV turns to the legal technology of charitable corporations that was employed to create and run the cemeteries. Cemeteries were made possible by the corporate form and the affluence of the republic; they were also instruments in the creation of an ordered constitutional state. In this way, technology helped advance civilization through art and through improvement upon nature and through the creation of beauty. Part V takes a holistic look at the rural cemetery movement's relationship to public constitutional thinking. It turns to the two addresses at the Gettysburg National Cemetery, which reflected the constitutional thought of the Whigs in the thirty years leading into Civil War and also propelled a new vision of the Constitution, especially of democracy and equality.

## II. PUBLIC CONSTITUTIONALISM AND WHIG CONSTITUTIONALISM

### A. *The Literature of Public Constitutionalism*

For several decades, running back at least to Michael Kammen's path-breaking *A Machine that Would Go of Itself*,<sup>34</sup> scholars have expanded the scope of the study of constitutional law. They have shown

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33. ABRAHAM LINCOLN, *Address at Gettysburg, Pennsylvania*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 536 (Don E. Fehrenbacher ed., 1989).

34. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986) (focusing on how Americans celebrated the Constitution and appealed to it and what "the Constitution" meant to people making appeals to it).

that people outside of the Supreme Court had vibrant and sophisticated ideas about the Constitution and that those ideas have shaped how judges have understood the Constitution. But even more than that, they have shown that public constitutional ideas shaped political action as well.<sup>35</sup> Kammen focused on how Fourth of July addresses tapped the deep reservoir of respect for the Revolution and the Constitution to celebrate and advance constitutional values.<sup>36</sup> And in the wake of *A Machine that Would Go of Itself*, legal scholars and historians have expanded the spectrum of sources of constitutional study. They are increasingly finding the making of the constitutional culture in streets and in civic organizations.<sup>37</sup> These studies range from the legal ideas that motivated the American Revolution<sup>38</sup> to political and social organizations in the early Republic<sup>39</sup> to oratory in the African American community in the nineteenth century,<sup>40</sup> through to the twentieth-century reformers who took the civil rights movement into the streets and injected seemingly radical ideas into the courtroom<sup>41</sup>—and those who opposed the civil rights movement in the streets as well.<sup>42</sup> Perhaps in response to the robust criticism of scholarship on public constitutional law, which questions the relevance of studies of public ideas about the Constitution to the core issues of constitutional law,<sup>43</sup> scholars are also increasingly focusing on

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35. Even before Kammen, there was a literature that located Supreme Court decisions in the public thought about the Constitution. *See generally, e.g.*, DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); WILLIAM WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

36. KAMMEN, *supra* note 34, at 21, 45, 50, 70, 98, 227, 292-93.

37. *See, e.g.*, Mazzzone, *supra* note 20.

38. *See, e.g.*, DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830* (2005) (discussing ideas about constitutionalism from colonial New York through the early national period, with attention to how New York fit into various empires—from Great Britain through the United States).

39. *See, e.g.*, WALDSTREICHER, *supra* note 20; Hendrik Hartog, *The Constitution of Aspiration and the "Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987).

40. *See, e.g.*, MARTHA S. JONES, *ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900* (2009) (exploring how African American women spoke about law and constitutionalism and their place and rights in American government).

41. *See, e.g.*, KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012) (exploring African American lawyers' civil rights and civil litigation in the years leading into and including the Civil Rights movement).

42. *See, e.g.*, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (exploring both the Supreme Court decisions that made the Civil Rights movement and the reactions of people on all sides of the Civil Rights movement).

43. Lucas A. Powe, Jr., *Are "The People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 857 (2005) (book review) (pointing out that before the Civil War there were many actors beyond the Supreme Court in constitutional interpretation,



the ways that the public understanding of the Constitution had a powerful gravitational pull on the Supreme Court.<sup>44</sup> They also address how public ideas operate outside of the Supreme Court, often to constrain the action of legislators.<sup>45</sup> In fact, a central question for scholars addressing constitutional culture and its relationship to formal law is a subset of the question, what is the relationship between public ideas and constitutional thought?<sup>46</sup> This involves a series of questions: what is the nature of public constitutional thought and how do those ideas impel action (or restrain it)? That is, what are the contours of the thought and how do public constitutional ideas matter? Scholars may have decided their mission should be “*Taking the Constitution Away from the Court*.”<sup>47</sup> But how they are going to do that—and whether it has been done before—is something we are still exploring.<sup>48</sup>

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but arguing based on recent episodes of “popular constitutionalism” that we may be better off without it).

44. See, e.g., Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011) (locating similar public constitutional ideas about the Second Amendment in the briefs of state attorneys general); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1027 (2004); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (detailing the Supreme Court’s adoption of an interpretation of the Second Amendment that had become commonplace outside of the Court).

45. See, e.g., Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 900-01 (2005) (noting that constitutional culture addresses public’s various invocations of the Constitution but that scholarship is sometimes respectful and at other times suspicious of public judgments about the public’s power in Constitutional interpretation); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623 (2008) (focusing on invocations of sentiment, rather than reason, as a central feature of eighteenth century moral philosophy and constitutional thought).

46. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1635 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); see also Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159 (explaining how public ideas may serve to constrain political actors); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2049 (2010) (noting that scholars of popular constitutionalism have not yet developed a pragmatic theory of how popular ideas will work their way into principles of formal constitutional law).

47. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (hypothesizing that those outside the courts can and should advance their own constitutional ideas and act on them and that it is dangerous to rely on the courts as the protectors of liberty).

48. Some of those explorations have come in studies of how public ideas affect the development of Supreme Court doctrine. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); see also Matthew Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

For the pre-Civil War period there is a particularly vibrant literature on civic organizations. Historian Johann Neem's *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* focuses on the emergence of an ideology that turned to private charitable corporations to pursue the public good in the early nineteenth century.<sup>49</sup> Neem's close study of Massachusetts follows other broader studies of the constitutional ideas and political theories of the Whigs.<sup>50</sup> This is particularly important because the public constitutional ideas tapped into core American values, which are often independent of constitutional text. Where our constitutional law is focused on interpretation of the text, this interpretative method competed with—and was often subordinate to—the constitutional values that were discussed in public addresses. The cemetery dedication addresses in the years leading into Gettysburg reveal the depth and breadth of such constitutional values.

Much of the study of what legal scholars frequently call “popular constitutionalism” is about how popular ideas about the Constitution are used to limit the scope of acceptable action for politicians—in essence a legislative oversight that substitutes for judicial review.<sup>51</sup> Yet, others are increasingly looking to the ways that public ideas about constitutionalism help to shape and impel positive action. This is particularly true for work on the Civil War, where attitudes about the perpetuity of the Union provided moral support to the war effort in the North, while in the South, their ideas of state power and property rights supported secession and war as well.<sup>52</sup>

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49. NEEM, *supra* note 20. See generally KEVIN BUTTERFIELD, *THE MAKING OF TOCQUEVILLE'S AMERICA: LAW AND ASSOCIATION IN THE EARLY UNITED STATES* (2015) (looking broadly at private associations in Jacksonian America and interpreting them as a key part of American culture).

50. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848* (2007); LAWRENCE FREDERICK KOHL, *THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA* 63-99 (1989).

51. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (discussing New Deal division of labor between legislatures and courts in which legislatures left decisions of constitutional limits largely to courts); Larry D. Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 699-700 (2006) (emphasizing the constraining role that constitutional law plays); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

52. See generally, e.g., MARK E. NEELY JR., *LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR* (2011) (exploring the constitutional arguments around the Civil War and secession). While historians are thoroughly skeptical of claims that the Civil War was about states' rights and constitutionalism as a distinct category from slavery, they are increasingly recognizing the ways that constitutional principles were utilized by Southern politicians to support secession, just as Northern visions of constitutionalism supported the cause of Union. See, e.g., DON E. FEHRENBACHER, *CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH* (1989) (discussing Southern invocations of constitutionalism during the era of slavery).

Scholars have already recognized that cemeteries were part of creating nation-wide stories about the past. For instance, as Michael Kammen showed in *Digging Up the Dead: A History of Notable American Reburials*, beginning in the middle of the nineteenth century, cemetery creators dug up and re-buried famous Americans to help add dignity and power to their cemeteries.<sup>53</sup> This was a part of the celebration of the past and the promulgation of the values of American nationhood. And there is a robust literature on Lincoln's Gettysburg Address.<sup>54</sup>

What has not yet been studied is the role that rural cemeteries played in the creation and sustenance of a constitutional vision.<sup>55</sup> Lincoln's words at Gettysburg represented a new constitutional vision of equality.<sup>56</sup> The seeds of that vision were laid over the preceding decades in many places, including the rural cemeteries that were planted in the United States beginning in the 1830s. This Article recovers the role that the dedication addresses served in the propagation of a constitutional culture. It also uses the addresses and the cemeteries corporations as a gauge of the constitutional vision put forward by the Whig Party. The cemetery was also a form of commemoration closely linked to the erection of monuments to the past. The era of the creation of the rural cemetery was also the era of monuments to the American Revolutionary generation, which included the Bunker Hill Monument;<sup>57</sup> the Washington Monument in Washington, DC;<sup>58</sup> and Richmond, Virginia's Washington Equine Statue;<sup>59</sup> as well as numerous local monuments to Washington, such as copies of the Washington statue in the Richmond capitol building that were displayed in Raleigh, North Carolina, and Columbia, South

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53. See generally MICHAEL KAMMEN, *DIGGING UP THE DEAD: A HISTORY OF NOTABLE AMERICAN REBURIALS* (2010).

54. See, e.g., MARTIN P. JOHNSON, *WRITING THE GETTYSBURG ADDRESS* (2013); GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992).

55. The leading historian of the rural cemetery movement begins her book with an acknowledgment of the role that cemeteries might play in political thought. See LINDEN, *supra* note 2, at 1 ("In the new republic, the art of the painter, the sculptor, the architect, and the landscape gardener would augment and perpetuate the work of statecraft."). Linden's book does not address the constitutional significance of the cemeteries and the addresses.

56. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 189* (2008); WILLS, *supra* note 54, at 121-47.

57. See DANIEL WEBSTER, *AN ADDRESS DELIVERED AT THE LAYING OF THE CORNER STONE OF THE BUNKER HILL MONUMENT* (Boston, Cummings, Hilliard & Co., 3d ed. 1825).

58. ROBERT C. WINTHROP, *ORATION PRONOUNCED BY THE HONORABLE ROBERT C. WINTHROP, SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ON THE FOURTH OF JULY, 1848, ON THE OCCASION OF LAYING THE CORNER-STONE OF THE NATIONAL MONUMENT TO THE MEMORY OF WASHINGTON* (Washington, J. & G. S. Gideon, 1848).

59. R.M.T. HUNTER, *MR. HUNTER'S ORATION: OPENING ODE AND ORATION, DELIVERED AT THE INAUGURATION OF CRAWFORD'S EQUESTRIAN STATUTE OF WASHINGTON* (Richmond, Macfarlane & Fergusson, 1858).

Carolina.<sup>60</sup> A painting of Concord on the day of opening of the Revolution, entitled *View of Concord*, which was painted around 1830, further illustrates the centrality of the cemetery to the mindset of antebellum Americans and its relationship to American constitutionalism. For the cemetery appears at the center of the painting.<sup>61</sup>

### B. *The Whig Constitutional World*

In the years leading into Civil War, the dominant party of constitutionalism and law was the Whig Party.<sup>62</sup> The Whigs—who were the successors to the Federalists and the forerunners of the Republican Party<sup>63</sup>—concentrated their attention on government promotion of economic development, technological and moral progress, and order through law.<sup>64</sup>

For Americans in the 1830s and 1840s, the central issues included how to maintain the Union amidst rapid technological and economic changes. As the country grew in size and innovations like the steamship and railroad allowed people increased mobility, the traditional bonds that united people—connections to their family and place of birth—declined. Thus, the market revolution led to a decline of human connections.<sup>65</sup> America in the 1830s was a world of individualism,<sup>66</sup> of the market,<sup>67</sup> and of revolutions in communication<sup>68</sup> and mi-

60. See TOM ELMORE, COLUMBIA CIVIL WAR LANDMARKS 47-48 (2011); Gordon S. Wood, *The Legacy of Rome in the American Revolution*, in THOMAS JEFFERSON, THE CLASSICAL WORLD, AND EARLY AMERICA 11, 26 (Peter S. Onuf & Nicholas P. Cole eds., 2011) (discussing statues modeled on classical art); *Historical Notes*, 8 S.C. HIST. & GENEALOGICAL MAG. 42, 42-43 (1907) (discussing placement of Houdon statue at Columbia, South Carolina statehouse); Christopher M. S. Johns, *Proslavery Politics and Classical Authority: Antonio Canova's "George Washington,"* 47 MEMOIRS AM. ACAD. ROME 119, 121, 124 (2002); see also MICHAEL KAMMEN, MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE 17-40, 685-88 (1993) (discussing how Americans recorded their history as they wanted it to be, to tell stories about their imagined, rather than actual, past).

61. *View of Concord*, NAT'L GALLERY OF ART, <http://www.nga.gov/content/ngaweb/Collection/art-object-page.56748.html> (last visited Apr. 10, 2016); see also MICHAEL G. KAMMEN, MEADOWS OF MEMORY: IMAGES OF TIME AND TRADITION IN AMERICAN ART AND CULTURE 63-64 (1992).

62. See generally RUSH WELTER, THE MIND OF AMERICA, 1820-1860 (1975) (attending to differences between Whigs and Democrats and focusing on Whig constitutional ideas).

63. WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856, at 13 (1987).

64. William W. Fisher, III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 112-20 (1990).

65. KOHL, *supra* note 50, at 15 (loosening of traditional bonds).

66. See *id.* at 6-12.

67. HOWE, *supra* note 50, at 5 (discussing market growth rather than revolution and referring to the "communications revolution"); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846 (1991).

68. HOWE, *supra* note 50, at 5.

gration.<sup>69</sup> Thus, in law there was the emergence of rules promoting duty to others—like the rapidly growing law of trustees' responsibility to beneficiaries.<sup>70</sup> Where traditional relationships might have constrained violence in the early Republic, by the 1830s riots were a major concern in cities.<sup>71</sup>

The Whig response to these rapid and unsettling changes was a series of intersecting ideas. These ideas included promotion of duties to oneself and to one's nation,<sup>72</sup> which would help increase trust and promote national harmony. Then, working outwards from the focus on the duties of the individual, Whigs saw a need to promote the rule of law in the face of what seemed like a lawless people and uncontrolled passions.<sup>73</sup> They looked with fear and disdain at various events, such as the city riots,<sup>74</sup> state legislatures' attempts to infringe on property rights of corporations,<sup>75</sup> and President Andrew Jackson's confrontation with the Supreme Court.<sup>76</sup> Whigs appealed to the state and national governments to promote economic growth, such as through funding of internal improvement programs like canals, roads, and railroads.<sup>77</sup> They capped these off with appeals to patriotism and the bounties that could accrue to the country if it promoted obedience to law and economic growth. Thus, economic growth, rule of law, property rights, and Union were central themes of Whig constitutional thought.<sup>78</sup>

For instance, William Gaston, then a Whig politician but soon-to-be member of the North Carolina Supreme Court, linked trade and law with economic and intellectual progress in a letter he sent to a group of Whigs in Montgomery, Alabama:

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69. *Id.* at 41-43 (migration and transportation).

70. *See, e.g.,* Alfred L. Brophy & Douglas Bradley Thie, *Land, Slaves, and Bonds: Trust and Probate in the Pre-Civil War Shenandoah Valley*, W. VA. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2113084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2113084) (discussing need for robust trust law in pre-Civil War era to protect beneficiaries in the increasingly impersonal market economy); Stephen Duane Davis II & Alfred L. Brophy, "The Most Solemn Act of My Life": Family, Property, Will, and Trust in the Antebellum South, 62 ALA. L. REV. 757, 783-89 (2011) (discussing incidence of trusts in wills among slave-owners in the old South and identifying the role of "the trust as instrument of economic development").

71. WILLIAM GASTON, AN ADDRESS DELIVERED BEFORE THE AMERICAN WHIG AND CLOSOPHIC SOCIETIES OF THE COLLEGE OF NEW JERSEY, SEPTEMBER 29, 1835, at 11 (Princeton, J. Bogart 1835) (appeal to duties to nation and law).

72. *See, e.g.,* WILLIAM GASTON, ADDRESS DELIVERED BEFORE THE PHILANTHROPIC AND DIALECTIC SOCIETIES, AT CHAPEL-HILL, N. C., JUNE 20, 1832 (Richmond, Thomas W. White, 2d ed. 1832) (on duties of individuals).

73. GASTON, *supra* note 71, at 22, 39-40.

74. *Id.* at 39-40.

75. James Kent, *Supreme Court of the United States*, 2 N.Y. REV. 372, 385-86 (1838).

76. HOWE, *supra* note 50, at 410-13.

77. *Id.* at 220-21.

78. *See* Brophy, *supra* note 19, at 1929-33; KOHL, *supra* note 50, at 145-85.

Free as heart could wish, yet loyal to all constitutional and legal obligations, united even more by affection than by the forms of a common government, and practically drawing more and more closely together by the wonder working Steam Boat[,] the Canal[,] and the Railroad; subduing the forest to the dominion of Agriculture and whitening every sea with their sail; advancing daily in manufacturing and mechanical skill, in art, science, and literature; growing with unexampled rapidity in [making] wealth and strength; enjoying the blessings of Providence . . . How could I look upon these my happy fellow citizens . . . without a thrill of exultation that this was my own very native land?<sup>79</sup>

Law and constitutionalism were part of the process of creating the nation, along with economic, moral, and technological progress.<sup>80</sup>

This Whig vision of progress through private corporations came by the 1830s to be opposed to the Democratic vision of progress, of good springing up from the many.<sup>81</sup> A classic statement of the conflict comes in the *Charles River Bridge* case,<sup>82</sup> in which Justice Story's vision of broad respect for a charter to a private corporation conflicted with Chief Justice Roger Taney's vision of narrow construction of that charter, to protect the public's right against monopoly.<sup>83</sup> This conflict played out frequently in cases at the federal and state level throughout the Civil War, with oscillation between broader constructions of charters by Whigs and narrower constructions by Democrats.<sup>84</sup>

Senator Daniel Webster's argument in the *Dartmouth College* case is a key example of sentimental appeal that mobilized support for a constitutional principle. Webster's peroration appealed to the Court to save the school and others like it, which contributed so much to knowledge. Webster's appeal on behalf of Dartmouth College used sentiment to support the school's charter granted by the Crown before the Revolution and thus to preserve property rights from altera-

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79. Letter from William Gaston to Gentlemen, Montgomery, Alabama Whigs (Oct. 3, 1832) (Gaston Papers, on file with Wilson Library, UNC).

80. HOWE, *supra* note 50, at 411-45 (discussing *Jacksonian Democracy and the Rule of Law*).

81. NEEM, *supra* note 20, at 141.

82. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 554 (1837).

83. *See id.* at 583 (Story, J., dissenting); Kent, *supra* note 75, at 385 (complaining about *Charles River Bridge's* attack on property rights).

84. *See* OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 101-03 (1969) (discussing Massachusetts context of *Charles River Bridge*); Stephen Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986).

tion by the New Hampshire Legislature.<sup>85</sup> The *Dartmouth College* case is an example of a private corporation that performed public good.<sup>86</sup>

While Whigs focused on property rights as a central part of their constitutional virtues, the Democrats interpreted the Whig's constitutional agenda differently. For Democrats saw the promotion of property rights as a detriment to equality. George Bancroft, a leading Democrat thinker and the author of Andrew Jackson's second inaugural address, for instance, described Whig constitutional thought in a July Fourth oration in 1836 in Springfield, Massachusetts.<sup>87</sup> Bancroft said that "the whig idolizes present possessions . . . the whig, forgetting that God is not the God of the dead, appeals to prescription; . . . [and] the whig [pleads] for a wealthy aristocracy . . . ."<sup>88</sup> Bancroft thought that the Whigs' focus on "liberty" was really a focus on vested property rights.

The whig professes to cherish liberty, and he cherishes only his chartered franchises. The privileges that he extorts from a careless or a corrupt legislature, he asserts to be sacred and inviolable. He applies the doctrine of divine right to legislative grants, and spreads the mantle of superstition round contracts. He professes to adore freedom, and he pants for monopoly.<sup>89</sup>

Where Whigs called for law and constitutionalism, Democrats saw an interference with "justice."<sup>90</sup> There was, thus, a serious question about the virtues of property—whether constitutional property rights were virtues or whether they subordinated human rights.<sup>91</sup> But whatever interpretation one places on Whig constitutional thought, there was agreement by both Whigs and Democrats that Whigs focused on constitutional thought as it related to property and to vested rights.

Nevertheless, Whigs promulgated their constitutional vision frequently through public oratory, including dedication addresses for

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85. See, e.g., ROBERT A. FERGUSON, *LAW & LETTERS IN AMERICAN CULTURE* 213-18 (1984) (discussing Webster's *Dartmouth College* argument); WHITE, *supra* note 17, at 616-17.

86. See Mark McGarvie, *Dartmouth College and the Legal Design of Civil Society*, in CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 91-106 (Lawrence J. Friedman & Mark McGarvie eds., 2003).

87. GEORGE BANCROFT, *AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD AND NEIGHBORING TOWNS, JULY 4, 1836* (Springfield, George & Charles Merriam 1836).

88. *Id.* at 10-11.

89. *Id.* at 7.

90. *Id.* at 6.

91. *Id.* at 11.

monuments,<sup>92</sup> churches,<sup>93</sup> and school buildings,<sup>94</sup> as well as funeral orations<sup>95</sup> and college literary addresses.<sup>96</sup> The cemeteries and the dedication addresses for them were, thus, part of American constitutional culture. This Article moves from the general ideas in the addresses, which were frequently about personal and sentimental uplift and patriotic duty, to more specific ideas of the Whig constitutional ideology. The cemeteries were part of a Whig mission of ordering the home, the marketplace, the community, and the nation through a combination of appeals to sentiment,<sup>97</sup> adherence to law,<sup>98</sup> and use of civic associations.<sup>99</sup> The addresses, thus, fit into a matrix of ideas about the individual's support for the state<sup>100</sup> and the use of civic organizations to advance the state's mission.<sup>101</sup>

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92. HUNTER, *supra* note 59; WEBSTER, *supra* note 57; DANIEL WEBSTER, AN ADDRESS DELIVERED AT THE COMPLETION OF THE BUNKER HILL MONUMENT, JUNE 17, 1843 (Boston, Tappan & Dennet 1843).

93. J. H. THORNWELL, THE RIGHTS AND THE DUTIES OF MASTERS: A SERMON PREACHED AT THE DEDICATION OF A CHURCH, ERECTED IN CHARLESTON, S.C., FOR THE BENEFIT AND INSTRUCTION OF THE COLOURED POPULATION (Charleston, Walker & James 1850).

94. CHARLES FRASER, AN ADDRESS DELIVERED BEFORE THE CITIZENS OF CHARLESTON AND THE GRAND LODGE OF SOUTH CAROLINA AT THE LAYING OF THE CORNER STONE OF A NEW COLLEGE EDIFICE WITH MASONIC CEREMONIES ON THE 12TH JANUARY, 1828 (Charleston, J.S. Burges 1828).

95. EDWARD EVERETT, ADDRESS DELIVERED AT CHARLESTOWN, AUGUST 1, 1826, IN COMMEMORATION OF JOHN ADAMS AND THOMAS JEFFERSON (Boston, William L. Lewis 1826).

96. TIMOTHY WALKER, THE REFORM SPIRIT OF THE DAY: AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY, JULY 18, 1850 (Boston & Cambridge, James Munroe & Co. 1850).

97. *See, e.g.*, JAMES C. BRUCE, AN ADDRESS DELIVERED BEFORE THE ALUMNI AND GRADUATING CLASS OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, JUNE 3, 1841, at 12 (Raleigh, North Carolina Standard 1841) (explaining that the United States had made a reality of what had been a utopian dream); BARTHOLOMEW F. MOORE, AN ADDRESS DELIVERED BEFORE THE TWO LITERARY SOCIETIES OF THE UNIVERSITY OF NORTH CAROLINA 14 (Raleigh, Order of the Society 1846) (appealing to sentiments of the "silken cord [of Union]").

98. *See, e.g.*, GASTON, *supra* note 71, at 21-25 (appealing to constraints of law as a civilizer).

99. *See, e.g.*, NEEM, *supra* note 20, at 6 (discussing formation of a culture of non-governmental civic associations "to form private organizations to promote their interests and to shape public opinion").

100. DANIEL D. BARNARD, MAN AND THE STATE: SOCIAL AND POLITICAL: AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA AT YALE COLLEGE, NEW HAVEN, AUGUST 19, 1846, at 6, 8 (New Haven, B.L. Hamlen 1846). Aaron Wunsch's expansive study of Philadelphia cemeteries offers a detailed picture of how the constitutional and public values fit together in the eighteenth and nineteenth centuries. *See* Aaron Vickers Wunsch, Parceling the Picturesque: "Rural" Cemeteries and Urban Context in Nineteenth-Century Philadelphia (Fall 2009) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

101. Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 552-88 (1819) (Webster's argument).



### III. THE PURPOSES, LESSONS, AND PLACES OF CEMETERIES IN THE CONSTITUTIONAL ORDER

In 1845, at the dedication of Spring Grove Cemetery near Cincinnati, Ohio, U.S. Supreme Court Justice John McLean spoke about how the “voice from the tomb reaches [the] heart!”<sup>102</sup> The lessons of the cemetery helped formulate character. Cemeteries spoke to individuals, and this was part of the Whig mission of individual reform. “There is no language which reaches the heart with such power and effect as that which proceeds from the graves of those we loved,”<sup>103</sup> said Justice McLean, who a dozen years later dissented in the *Dred Scott* decision.<sup>104</sup> Graves spoke to the dead and encouraged them to virtue because they reminded the visitor of “the end of Mortality.”<sup>105</sup> Such a reminder “must chasten the heart.”<sup>106</sup>

By such reminders, the cemetery created more virtuous citizens. For it caused citizens to ask, “[W]hy should I cherish an unholy ambition for fame, or seek to accumulate wealth by doubtful means? Why should I endeavor, by injustice, to enrich myself at the expense of my neighbor, seeing the time of enjoyment is so short, and the end of my career is so certain?”<sup>107</sup> The cemetery conveyed such ideas by both seeing and feeling. It did this in a number of ways, from appealing to beauty to countering the market to serving as part of a Christian republic.

#### A. *Beauty, Landscape, Setting, and Uplift*

Many addresses drew on romantic images, and in that era the beauty of landscape was seen as one important mode of moral uplift.<sup>108</sup> Beauty and nature combined to instruct.

This human improvement of nature was frequently discussed by landscape artists as well—people who had special reason to observe and understand the relationship of nature to human progress and art. For example, landscape artist Thomas Cole spoke to a lyceum audience in 1836 about the power of cultivated scenery. Though Cole was talking about landscape paintings, his reasoning applies equally to garden cemeteries. Cultivated scenery facilitated the shaping of human culture.

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102. JOHN MCLEAN, ADDRESS DELIVERED ON THE CONSECRATION OF THE SPRING GROVE CEMETERY, NEAR CINCINNATI, AUGUST 20TH, 1845, at 14 (Cincinnati, Daily Atlas Office 1845).

103. MCLEAN, *supra* note 102, at 13.

104. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 529 (1857) (McLean, J., dissenting).

105. MCLEAN, *supra* note 102, at 13.

106. *Id.*

107. *Id.* at 13-14.

108. *See, e.g., id.* at 11-13; OAKWOOD CEMETERY, *supra* note 23, at 36.

[Such scenery] is still more important [than natural scenery] to man in his social capacity—necessarily bringing him in contact with the cultured; it encompasses our homes, and, though devoid of the stern sublimity of the wild, its quieter spirit steals tenderly into our bosoms mingled with a thousand domestic affections and heart-touching associations—human hands have wrought, and human deeds hallowed all around.<sup>109</sup>

The South Carolina landscape artist Charles Fraser, thus, was particularly well-situated to lecture on the power of beauty of the natural world and the cultivated garden at the 1850 dedication of Charleston's Magnolia cemetery. Fraser's address linked the beauty of cemeteries to the public character. He thought that the rural cemeteries were motivated in part by problems with city cemeteries, as "an emigrant population fill[ed] up our cities" and there emerged "a fatal epidemic, hitherto unknown in our favored country; carrying disease and mortality into its healthiest portions."<sup>110</sup> But even more impetus came from an understanding of the "moral proprieties involved in the subject."<sup>111</sup> Beauty could mold and improve character and make more fit citizens. Cemeteries offered "peaceful situations, where the beauties of nature and the improvements of art may be united in promoting the moral purposes of their establishment."<sup>112</sup> Fraser likened the cemetery to an "unsullied canvas, inviting creations of fancy from the pencil of the artist."<sup>113</sup> The cemetery offered "a wide field, in almost original simplicity, . . . spread before you by the hand of nature, and requiring only the adornments of taste to carry out her design of beauty."<sup>114</sup>

Many others joined Fraser in these sentiments. At the dedication of Savannah's Laurel Grove Cemetery in 1852, lawyer Henry Rootes Jackson praised nature for providing a setting. He called for improvement of the garden. "Nature has done her part in the work, by presenting a surface beautifully undulating,—with the level plain, the gentle declivity, the dark ravine,—and planting around her stately forests with their pendant moss. Nature has done her part; it remains but for Art to do hers."<sup>115</sup> And the artwork about the cemeter-

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109. Thomas Cole, *Proceedings of the American Lyceum: Essay on American Scenery*, AM. MONTHLY MAG., Jan. 1836, at 1, 3. Where Cole was concerned with wild nature, the cemetery was a retreat both from wilderness and the market.

110. CHARLES FRASER, ADDRESS DELIVERED ON THE DEDICATION OF MAGNOLIA CEMETERY, ON THE 19TH NOVEMBER, 1850, at 17 (Charleston, Walker & James 1850).

111. *Id.*

112. *Id.* at 17-18.

113. *Id.* at 19.

114. *Id.*

115. LAUREL GROVE CEMETERY!, AN ACCOUNT OF ITS DEDICATION, WITH THE POEM OF THE HON. ROBERT M. CHARLTON, AND THE ADDRESS OF THE HON. HENRY R. JACKSON, DELIVERED ON THE 10TH NOVEMBER, 1852, TO WHICH ARE ADDED THE ORDINANCES

ies confirmed that they had a role in beautification of the landscape. For instance, prints made from the 1830s through the 1850s celebrated the ordered beauty of Mount Auburn. These included William Henry Bartlett's views of Mount Auburn in *American Scenery*<sup>116</sup> and Thomas Chambers' *Mount Auburn Cemetery*.<sup>117</sup> The carefully ordered nature of the cemeteries is also apparent in the maps that were produced for the cemeteries.<sup>118</sup>

Their beauty was one of the rural cemeteries' great advantages. Revered J.H.C. Dosh asked at the 1855 dedication of Gettysburg's Ever Green Cemetery—soon to become world famous as the scene of battle—"Could a more lovely spot have been chosen?"<sup>119</sup> Reverend F.W. Shelton began his dedication address for the Green Mount Cemetery in Montpelier, Vermont, in 1855, with an observation about how the cemetery had already improved upon the wilderness:

We stand upon a hill-side which, almost yesterday, lay unreclaimed in its original wildness, and now already it begins to look like an embellished garden. Art has redeemed it from its rude estate, with an almost magic transformation. It has its winding walks, and will have its shady avenues. It is the most choice position in this valley, and its natural surface presents the charm of great variety. There is no stretch of landscape, in this neighborhood, around the abodes of the living, which can vie in beauty with this Paradise which you now dedicate, as the resting place of your beloved dead.<sup>120</sup>

The beauty of cemeteries inspired visitors. The cemeteries were not just places to visit ancestors; they were refuges for many from

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ESTABLISHING AND REGULATING THE CEMETERY 19 (Savannah, City Council 1852); *see also* HENRY R. JACKSON, COURAGE: AN ORATION DELIVERED BEFORE THE LITERARY SOCIETIES OF FRANKLIN COLLEGE AUGUST 3, 1848 (Athens, Demosthenian Society 1848); HENRY R. JACKSON, TALLULAH AND OTHER POEMS (Savannah, John M. Cooper 1850) (emphasizing pastoral themes).

116. *See* N. P. WILLIS, AMERICAN SCENERY; OR LAND, LAKE, AND RIVER: ILLUSTRATIONS OF TRANSATLANTIC NATURE 97 (London, James S. Virtue 1840).

117. *See* NAT'L GALLERY OF ART, AMERICAN NATIVE PAINTINGS 54 (Judith Millon ed., 1992) (discussing Chambers' *View of Mount Auburn*).

118. *See, e.g.*, ALBANY RURAL CEMETERY (n.p., J.E. Gavit 1846), <http://digitalgallery.nypl.org/nypldigital/id?434097>; MOUNT AUBURN, AVENUES AND PATHS (Boston, Nathaniel Dearborn 1848), <http://maps.bpl.org/id/12739>.

119. J.H.C. DOSH, ANNOUNCEMENT OF ADDRESS DELIVERED AT THE OPENING CEREMONIES OF EVER GREEN CEMETERY, GETTYSBURG, PA., NOVEMBER, 7, 1854, at 5 (Gettysburg, H.C. Neinstadt 1855).

120. F.W. Shelton, *Address, in* SERVICES AT THE DEDICATION OF GREEN MOUNTAIN CEMETERY, MONTPELIER, VT., SEPTEMBER 15, 1855, WITH THE RULES AND REGULATIONS 17 (Montpelier, E.P. Walton, Jr. 1855); *see also* JOHN F. NORTON, THE HOME OF THE ANCIENT DEAD RESTORED: AN ADDRESS DELIVERED AT ALTHOL ON JULY 4, 1859, at 22 (Althol Depot, Rufus Putnam 1859) (the cemetery "turned this wilderness into a fruitful field"). This is the story of America written in the cemetery, and this is precisely the story that landscape artists were telling at the same time.

city life. Reverend Pharcellus Church's dedication of the Rochester Cemetery in 1838 called upon romantic imagery to convey the beauty of the cemetery and the inspiration that visitors would feel:

[W]hen you stand on the summit itself, how enchanting is the prospect! The smooth current of the Genesee meandering round the base, and stealing its now obvious and now concealed way to the distant lake, like the passing of life through shade and sunshine to the ocean of eternity. Around, you see, spread out in the ample view, the rich fields of one of the richest countries in the world, sending their loaded harvests to the marts of trade, and supplying the staff of life to millions of people. Before you lies the thronged city, with its spires and minarets pointing to heaven, while the clatter of hydraulic machinery, or the deep toned bell, or the voices of living multitudes, united to the roar of the neighboring cascades, all, send up to heaven a voice as deafening and discordant as the cries of factious clans on the world's tumultuous theatre. Far off beyond the city, the broad blue Ontario skirts the undefined distance, as if to remind you of the boundless fields of existence which eternity will unfold, and to make you feel how few and meager are the objects subjected to our present inspection, compared with those in the distance, which a future world will disclose.<sup>121</sup>

Other addresses linked natural settings with the cemeteries' lessons. "The Cemetery is nature's Commentary, in which are drawn out . . . the inevitable destinies of man," said Reverend Abraham Gillette at the dedication of Woodlands Cemetery in Cambridge, New York, near Albany, in 1858.<sup>122</sup> "It is a book that may ever be read with impressiveness and profit. To the cultivated and the rude, it is a faithful and true prediction of the unavoidable doom of our fallen race."<sup>123</sup> Gillette explained the mechanism by which the cemetery worked its magic: "Cemeteries exert a healthful moral influence over the minds and hearts of the living. . . . I believe few persons in whose bosoms glow any sparks of moral emotion, can visit a rural Cemetery, without leaving it a humbler and better citizen, parent, friend, kindred and man."<sup>124</sup>

The rural cemeteries, thus, tapped into values of nature, art, and sentiment. The cemeteries provided a place of beauty and order in a

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121. PHARCELLUS CHURCH, AN ADDRESS DELIVERED AT THE DEDICATION OF MOUNT HOPE CEMETERY, ROCHESTER, OCT. 2, 1838; AND REPEATED, BY REQUEST, BEFORE THE ROCHESTER ATHENÆUM AND YOUNG MEN'S ASSOCIATION 17 (Rochester, David Hoyt 1839).

122. THE WOODLANDS CEMETERY AT CAMBRIDGE, N.Y., WITH HISTORICAL SKETCHES AND AN ADDRESS OF REV. A.D. GILLETTE, D. D., DELIVERED AT THE DEDICATION JUNE 2, 1858, at 45 (Troy, N.Y., A.W. Scribner & Co. 1859).

123. *Id.*

124. *Id.* at 46 ("Among the refined Greeks and sturdy Romans, the dead were buried beyond the walls of Towns . . . . How rich with lessons of mortality these sequestered shades, groves and tomb-stones must become—generations better than ours shall live to testify.").

chaotic world.<sup>125</sup> The cities were crowded and having graveyards in them was a health hazard; moreover, the city was not an appropriate place to mourn the dead. With the advent of rural cemeteries came the chance for something peaceful and dignified—a place of sentiment—which was a way of responding to the market. The cemeteries were far enough away from the center of town that they would not be threatened by city life. This was especially important because the crowded urban graveyards were believed to threaten public health.<sup>126</sup> In fact, the rural cemeteries grew up as the cities prohibited burial.<sup>127</sup> In short, beauty, order, and improvement over nature all led to virtue.

Even the location of the cemeteries often conveyed a sense of continuity of place. Many were built on the site of former Indian burial grounds, or at least stories were frequently told about how the cemeteries were built on Indian burial grounds. Fort Hill Cemetery, for example, in Auburn, New York, was supposed to have been built on the site of an ancient Indian village cemetery.<sup>128</sup>

At other times, the importance of the cemetery's location sprang from more recent events. Brooklyn's Greenwood Cemetery, for instance, was built within sight of the Revolutionary War Brooklyn battlefield.<sup>129</sup> At Magnolia Cemetery in Charleston a recent burial there conferred particular dignity. A soldier who died in the Mexican American War was buried in the spot where he had last spoken with his mother before his regiment decamped for the war. Artist Charles Fraser told the story in sentimental terms in his 1850 dedication address:

Filial piety, parental affection, devoted patriotism, are the moral elements of the atmosphere that surrounds it. . . . For *there* were interchanged the last farewell words between a dutiful son and an

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125. See KOHL, *supra* note 50, at 147-48 (discussing Whig desire for order in a world of chaos); WILLS, *supra* note 54, at 64-68 (discussing cemeteries' appeal as places of order and peaceful nature).

126. HENRY LAURENS PINCKNEY, REMARKS ADDRESSED TO THE CITIZENS OF CHARLESTON, ON THE SUBJECT OF INTERMENTS, AND THE POLICY OF ESTABLISHING A PUBLIC CEMETERY, BEYOND THE PRECINCTS OF THE CITY (Charleston, W. Riley 1839) (discussing right of Charleston to prohibit burials that would be a health hazard); *Brick Presbyterian Church in N.Y. v. New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826) (upholding a New York City ordinance prohibiting burials); see also LINDEN, *supra* note 2, at 149.

127. See LINDEN, *supra* note 2, at 149-63; see also WILLS, *supra* note 54, at 71 (linking rural cemeteries and the Victorian culture's fascination with death); Thomas Bender, *The "Rural" Cemetery Movement: Urban Travail and the Appeal of Nature*, 47 N. ENG. Q. 196, 196-211 (1974).

128. FORT HILL CEMETERY ASS'N., HANDBOOK OF FORT HILL CEMETERY: CONTAINING INFORMATION RESPECTING THE ANCIENT MOUND AND FORTIFICATION, AND THE INDIAN MONUMENT WITHIN THE ENCLOSURE 5 (Auburn, W.J. Moses 1853).

129. NEHEMIAH CLEAVELAND, GREEN-WOOD ILLUSTRATED 79-91 (New York, R. Martin 1847).

affectionate mother. The regiment was quartered in this neighborhood, on the eve of its departure for Mexico. Under that tree, and on that secluded spot, . . . the interview took place. How deeply it impressed him, may be learned from the fact, that he requested, should he fall in battle, that his remains might be brought home to his native soil, and deposited on a spot so endeared to his recollection.<sup>130</sup>

Even when there was no particular historical association of the place, the beautiful setting of the cemetery—as improved by human cultivation—had an elevating power.<sup>131</sup> Edward Humphrey emphasized this in 1848 at the dedication of Cave Hill near Louisville:

The bleak hill-side, or the unprotected and barren field, is not suitable either for the living or the dead. Let the place of graves be rural and beautiful. Let it be under the free air and cheerful light of heaven. Let trees be planted there. Let the opening year invite to their branches the springing leaf and birds of song, and when the leaves and birds are gone, let the winds summon from their boughs sweet and melancholy strains. Let the tokens of fond remembrance, in the shrub and flower, be there. Let the murmuring of the gentle rill be there. There let the rising sun cast westward the shadows, admonishing us of life's decline, and then let the evening shadows point to the eastern sky, in promise of another and brighter day. Amidst ever-changing beauty and harmony, where the decay and renovation of nature may perpetually remind us that we must die, and that to die is to live again, there, let the dust return to the earth as it was.<sup>132</sup>

Such places were hallowed even before the rural cemeteries were planted there; and, the place helped to add to the cemetery's dignity and to the lessons that the cemetery could teach. For cemeteries offered lessons on the continuity of the republic and the power of long-term rights.

### *B. Cemeteries as Places of Repose from City and Market*

The placement of cemeteries near cities, but far enough away from them as to be places of repose, was important to their civilizing mission.<sup>133</sup> Oliver Baldwin's 1849 address at Richmond's Hollywood

130. FRASER, *supra* note 110, at 21.

131. E.A. NISBET, THOUGHTS ON THE BEAUTIFUL: AN ADDRESS DELIVERED AT THE COMMENCEMENT OF THE GRIFFIN SYNODICAL FEMALE COLLEGE IN JUNE, 1857 (Griffin, Empire State Job Office 1857).

132. EDWARD P. HUMPHREY, AN ADDRESS, DELIVERED ON THE DEDICATION OF THE CAVE HILL CEMETERY, NEAR LOUISVILLE: JULY 25, 1848, at 15 (Louisville, Courier Job-Room 1848).

133. LINDEN, *supra* note 2, at 149-63 (discussing health concerns in Boston that impelled new burial places outside the crowded city); Stanley French, *The Cemetery as Cul-*

Cemetery linked the cemetery to the environment surrounding it. Baldwin wanted the cemetery near enough to the city that people might visit it, but far enough away to maintain the cemetery's seclusion.<sup>134</sup> From Hollywood Cemetery, high on a hill overlooking the James River, one could see Richmond's commerce and also survey centuries of history. The location made it possible for the cemetery to be a vehicle of uplift and repose.

We see the stream so replete with historic associations, seized for manufacturing purposes, and yonder black smoke telling where the captive waters struggle at the wheel and labour for the benefit of man. If the "Knights of the Golden Horse Shoe" have ceased to exist, we have an even more potent brotherhood in those Knights of the Iron Horse, whose dark track we see on yonder bridge, and whose fierce tramp may be heard on every hand, as with fiery nostrils he seems to devour the air, and with his exulting shout of triumph to make the forests ring. . . . [W]e behold distinct, but prominent, that commanding eminence, Church Hill, so replete with sublime historical recollections,—that sacred Church, from which the voice of Patrick Henry rang like a trumpet call upon the ear of every freeman in the land,—that political Sinai from which the Spirit of Liberty proclaimed—Thou shalt no longer bow the knee to kingly idols. . . . Within our sight are the halls of justice; the grand and symmetrical proportions of the Capitol; the temples of Religion, all whose office is to prepare us for this spot.<sup>135</sup>

Where Baldwin saw the connections between the cemetery and the ethic of commerce, most others who spoke about this saw cemeteries as a place for the development of art in a setting that was free from the market. This allowed citizens a respite from the bustle of the market, among art and nature. Though Whigs were the party of the market, they found in cemeteries an appropriate balance of the market. A book published in 1851 about Brooklyn's Greenwood Cemetery explained the contrast between the bustling city of the living and the peaceful city of the dead, which were so close together:

An opening on his left reveals to him the lower bay, Staten Island, and the Narrows. Another, in front, reaches across the harbor, and is bounded by the masts, spires, and dwellings of New York and Brooklyn. The little dell which he has just passed, with its shady water, is immediately below. Here, with a city of the living before him, and another of the dead growing up around, the charm of contrast is felt in its power. Here are presented, as it were, side by

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*tural Institution: The Establishment of Mount Auburn and the "Rural Cemetery" Movement*, 26 AM. Q. 37, 38-53 (1974).

134. OLIVER BALDWIN, ADDRESS DELIVERED AT THE DEDICATION OF THE HOLLYWOOD CEMETERY: ON MONDAY, THE 25TH JUNE, 1849, at 13 (Richmond, Macfarlane & Fergusson 1849).

135. *Id.* at 14-15.

side, art and nature—bustle and repose—life and death;—while each quiet sail, moving but noiseless, seems a fit medium of communication between them.<sup>136</sup>

Many others saw a similar moral effect of cemeteries, though they emphasized more the ways that cemeteries explicitly countered the market than the ways that they worked together. An article in the *Yale Literary Magazine*, for instance, concluded with a celebration of how cemeteries countered the cold feelings of the market:

The moral effect of a cemetery, thus laid out and ornamented, especially in the vicinity of a mammon-serving and tumultuous city, cannot well be overrated. Its solemn aisles are frequented by many who never seek elsewhere the temple of God. And though the giddy may prattle, and the sentimental pluck rose-buds for their fair ones—the white monument will still stand by their side, and death be their constant companion. As one enters such a place, a feeling steels over him, not unlike that which the traveler experiences as he gazes upon the mouldering shrines and cathedrals of some city of the past, whose memory is almost obliterated;—the impression indeed is deeper, and the suggestions more personal. At the close of day, or during the quiet hours of the Sabbath, I delight to wander among its ghostly mausoleums, to view the unsleeping green of nature, standing in solemn vigil over the last resting place of the immortal soul. As I gaze upon the obelisks of the wealthy, I reflect with sorrow upon the vanity and littleness of man,—as I walk by the monuments of the honored and loved, I am convinced that nothing can perpetuate our memories, but deeds of goodness and virtue; the quiet tombs of youthful beauty and loveliness remind me of the soul's immortality,—and the faded cenotaphs that commemorate the scattered dust of our ancestry, cause me to remember that the time is not far distant, when for us, too, shall "the silver cord be loosed, and the golden bowl broken."<sup>137</sup>

### C. *Speaking Through the Grave: The Cemetery as the "Great Moral Teacher"*

Story's words traveled far and served as a model for many subsequent dedications. Four years later when Stephen Duncan Walker urged Baltimore to establish a rural cemetery, he used a question Story had asked at Mount Auburn: "[W]ho that has stood on Mount Vernon, on the margin of the tranquil Potomac, 'but feels his heart more pure, his wishes more aspiring, his gratitude more warm, and his love of country touched by a holier flame?' "<sup>138</sup> Walker asked for

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136. CLEVELAND, *supra* note 129, at 26.

137. *Ornamental Cemeteries*, 21 YALE LITERARY MAG., Nov. 1855, at 4, 50.

138. S. D. WALKER, RURAL CEMETERY AND PUBLIC WALK 19 (Baltimore, Sands & Neilson 1835) (quoting STORY, *supra* note 1, at 14).



Baltimore to collect the remains of Maryland's founding fathers in one place because the graves of great people inspired more greatness. Such relics "would form a treasure if collected together, of inestimable value, upon which posterity might draw, without consuming; it would be a widow's cruse of holy impulses, forever flowing and forever full."<sup>139</sup> The power of cemeteries to instruct was great, indeed. The grave might "speak audibly to the human conscience, and though without tongue or voice, breathes with 'miraculous organs' over the mystic chords of sensibility, to the heart and to the judgment."<sup>140</sup>

Similarly, at the 1838 dedication of the Worcester Cemetery, Massachusetts Governor Levi Lincoln invoked Yale President Timothy Dwight's comments on cemeteries that "a Burial Ground should be a solemn object to man, because in this manner, it easily becomes a source of useful instruction, and desirable impressions."<sup>141</sup> Indeed, many dedication addresses emphasized that cemeteries provided instruction to the living.<sup>142</sup> But it was not only that the living learned from the cemeteries, cemeteries were indicators of how far culture had progressed. They illustrated the growth of social conditions. "[W]e build" cemeteries, one orator said in 1852, "for the use, the pleasure, the instruction, the edification of the living."<sup>143</sup> Unitarian Minister Amory B. Mayo explained in 1858, the society had progressed to the stage where it could afford better cemeteries than in the colonial era.<sup>144</sup> Cemeteries were, thus, both props to further progress and signifiers of progress.

The makers of the cemetery had the power to tell stories through the cemetery. Professor Edward North of Hamilton College told his audience at the dedication of the Clinton, New York cemetery in 1857 about the messages that cemeteries might deliver.

It is our privilege to speak from our graves. With this privilege comes the inquiry, What expression shall we choose for ourselves in our place of burial; in the memorials that tell where our dust reposes; in the surroundings and decorations of the spot? What shall be the lessons taught by the grave-ground we expect to occu-

139. *Id.* at 20.

140. *Id.*

141. HINTS ON THE SUBJECT OF INTERNMENTS WITHIN THE CITY OF PHILADELPHIA: ADDRESSED TO THE SERIOUS CONSIDERATION OF THE MEMBERS OF COUNCILS, COMMISSIONERS OF THE DISTRICTS, AND CITIZENS GENERALLY BY ATTICUS 14 (Philadelphia, William Brown 1838).

142. THE DALE CEMETERY, (AT CLAREMONT, NEAR SING-SING,) ITS INCORPORATION, RULES AND REGULATIONS, AND THE DEDICATION ADDRESSES 21 (New York, Casper C. Childs 1852) [hereinafter DALE CEMETERY].

143. *Id.* at 21.

144. A.D. MAYO, THE AMERICAN CEMETERY: AN ADDRESS AT THE DEDICATION OF GREEN HILL CEMETERY AT AMSTERDAM, MONTGOMERY CO., N.Y., ON WEDNESDAY, SEPTEMBER 1, 1858, at 7 (Amsterdam, N.Y., Recorder Office 1858).

py, and which, by a serious forethought that betokens innate longing for a glorified reunion of soul and body, we select, embellish and consecrate ere our time of departure?

. . . We shudder at the desecration of crowded city cemeteries when ruthless Mammon breaks down moss-covered headstones, invades the sanctity of family vaults, shovels out the relics of whole generations, and lays open streets or sells building lots where the hush of the sepulchre ought to have been perpetual.<sup>145</sup>

Lawyer Bellamy Storer, who had served as a Whig in Congress in the 1830s, explained the process of thought by which we could expect to learn lessons in a cemetery in his dedication address at Linden Grove Cemetery in Covington, Kentucky in 1843.

There is no train of reflection more subdued, nor more instructive, than that which is induced by the contemplation of a grave yard. We gather around us, while we wander among its monuments, the past, the present, and the future. All of life and of death, and the life to come, are grouped in the brief hour! We are dissociated from our fellows! We become individualized, in the truest sense of the term, and understand, if we never did before, the meaning of personal accountability, our relation to the world, and to Him who made the world!<sup>146</sup>

Storer, who began teaching at the University of Cincinnati Law School in 1855, did not speak exactly in constitutional terms. He was dealing with cultural ideas, like patriotism, that we associate with constitutional values.<sup>147</sup> Whig lawyer Daniel Barnard, who figures prominently later in this story, had a similar interpretation as Storer in his 1844 address at the Albany Cemetery. Barnard invoked general terms dealing with morality, which prepared individuals for constitutional government: "We may expect this place to become a great moral Teacher; and many valuable lessons there are, that may be learned here—lessons of humility, of moderation, of charity, of contentment, of mercy, of peace—lessons touching nearly all that concerns life, touching death, and touching immortality."<sup>148</sup>

145. ADDRESSES DELIVERED AT THE DEDICATION OF THE CLINTON CEMETERY 14-15 (Utica, Roberts 1857) [hereinafter CLINTON CEMETERY].

146. BELLAMY STORER, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE LINDEN GROVE CEMETERY, COVINGTON, KENTUCKY, SEPTEMBER 11, 1843, at 9 (Cincinnati, E. Morgan & Co. 1843).

147. More than a dozen years later, Storer's address at the University of Louisville linked law and the Bible. See BELLAMY STORER, THE LEGAL PROFESSION: AN ADDRESS DELIVERED BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF LOUISVILLE, KENTUCKY, FEBRUARY 20TH, 1856, at 13-15 (Cincinnati, C. Clark & Co. 1856) ("[In the Bible,] we . . . learn that human law, in its highest developments, is but an emanation from the hallowed flame that illuminates its every page.").

148. D. D. Barnard, *Address*, in ALBANY RURAL CEMETERY ASSOCIATION: ITS RULES, REGULATIONS &C., WITH AN APPENDIX 31-32 (Albany, C. Van Benthuyzen & Co. 1846).

Professor Truman Marcelleus Post of Washington University recalled in a speech at Bellefontaine Cemetery in St. Louis in 1851, that schools were often placed within sight of ancient cemeteries.

What a school was that of the cemetery of the Ceramicus, where Plato and Aristotle taught in sight of the tombs of the great departed! What memories there aided their instructions to the youth of Athens, with an eloquence more glowing, subduing and awful than the wisdom of the Areopagus or the Senate—than the heroic thought and Pythic enthusiasm of Homer or Pindar—or than the pathos of her tragic Muse, or the fiery logic of her great Orator. There, in awful marble, still spoke her great Lawgiver—there stood the hero of Marathon, whose trophies would not suffer Themistocles to sleep; and there Pericles, the true, the noble, the eloquent, still plead for the life and glory of the Athens he loved so well.<sup>149</sup>

Perhaps inspired by the recollection that ancient schools were located near cemeteries, in the 1830s Martin Dawson, an affluent reform-minded Virginian, left money in trust in his will to fund several schools, with the stipulation that at least one of the academies be located near his family's cemetery.<sup>150</sup> The Virginia legislature created "The Literary Fund" by a special act to hold Dawson's bequest.<sup>151</sup> The Liberty Fund supported several lower schools and the University of Virginia as well, though the entire will, which also provided for freedom for Dawson's slaves, was challenged by his relatives and the Virginia Court of Appeals heard several appeals regarding Dawson's estate.<sup>152</sup> Dawson's will is yet another example of the ways that cemeteries were located next to other reform movements, including education and anti-slavery, in the minds of Americans.

The cemeteries taught lessons to the entire nation, not just to the scholars in adjacent schools. For, as Professor Post recalled, Rome cemented "the tremendous strength of her empire in tears of honor for the dead, even more than in the blood of war."<sup>153</sup> Post's use of history as evidence of universal truths of human nature was common in

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149. DEDICATION OF THE BELLEFONTAINE CEMETERY: ADDRESS OF PROFESSOR POST, AND OTHER PROCEEDINGS ON THAT OCCASION; ALSO, THE RULES AND REGULATIONS, AND CHARTER OF THE RURAL CEMETERY ASSOCIATION, &C.; WITH AN APPENDIX CONTAINING THE PROCEEDINGS OF THE SECOND ANNUAL MEETING, AND REPORT OF THE SECRETARY AND TREASURER OF THE ASSOCIATION 19 (St. Louis, T.W. Ustick 1851).

150. *Literary Fund v. Dawson*, 37 Va. (10 Leigh) 147, 148 (1839), 1839 WL 2064 (requiring one seminary be located "in the county of Nelson, as near the graveyard in this mentioned, as a proper site can be procured").

151. *Id.* at 152 (discussing the incorporation of the "Literary Fund").

152. *See Dawson v. Dawson*, 37 Va. (10 Leigh) 602, 602-08 (1840), 1840 WL 2210; *Literary Fund v. Dawson*, 37 Va. (10 Leigh) 147-54 (1839), 1839 WL 2064.

153. POST, *supra* note 149, at 19.

the romantic era. Post's survey of recent history revealed a similar lesson—that monuments and cemeteries taught lessons to the entire nation:

So of modern nations—the monuments of the dead keep watch for the living. Does not the life of Britain this hour stand as much in the memories of Westminster, and other high places of her dead, as in her fleets and armies, or in her industrial greatness, or Parliamentary wisdom? Nor is the beneficent power of this sentiment confined to names eminent and world-famed. From sire to son in the obscurest household, and through all the relations of family and friendship, this contexture of sympathy and authoritative memory extends, binding together the fabric of society. Each hearth-side has its memories of virtues, thoughts and affections, unknown to the great world, but to it a vestal fire.<sup>154</sup>

Post then claimed:

[The rural cemetery] demanded by natural taste and for its moral uses, we may regard as almost a necessity of civilization; and we feel it worthy of ourselves and our city to provide such a place for the burial of our dead, and to consecrate it for all coming time as a sanctuary for grief, and memory, and funeral silence and repose.<sup>155</sup>

The cemeteries instructed when visitors saw the graves of ancestors and of venerable people and learned about the deeds of great people buried there. Instruction came from the sentiments that visiting graves conjured, as generations of poets had already spoken about—from Gray's "An Elegy Written in a Country Churchyard"<sup>156</sup> to William Cullen Bryant's 1817 poem "Thanatopsis."<sup>157</sup>

Presbyterian minister (and later professor at Centre College) Edward Humphrey phrased the moral values of cemeteries succinctly in his dedication of the Cave Hill Cemetery near Louisville, Kentucky, in July 1848. The cemetery's "ancient monuments, its pious inscriptions, its moss-covered head-stones, its venerable shades, the memory of the great and good of olden time, constitute a legacy of imperishable moral wealth to those who come after."<sup>158</sup> Humphrey's address to the Phi Delta Theta literary society at Miami University in 1853 provides a context for his thoughts about the role that the cemetery could provide in moral uplift.<sup>159</sup> That address surveyed

154. *Id.* at 19-20.

155. *Id.* at 20.

156. THOMAS GRAY, AN ELEGY WRITTEN IN A COUNTRY CHURCHYARD (Philadelphia, J.B. Lippincott & Co. 1883).

157. WILLIAM CULLEN BRYANT, THANATOPSIS (N.Y., G.P. Putnam's Sons 1817).

158. HUMPHREY, *supra* note 132, at 10-11.

159. E.P. HUMPHREY, ADDRESS DELIVERED BEFORE THE SOCIETY OF THE "PHI DELTA THETA" AT THE MIAMI UNIVERSITY, JUNE 29, 1853 (Cincinnati, C. Clark & Co. 1853).

western civilization to tell a story of gradual progress. He concluded with a character study of Henry Clay, designed to show how great men were made.<sup>160</sup> Humphrey portrayed Clay's education during the Revolution as setting the course of his life.<sup>161</sup> Clay's experience during the Revolution and the early republic left him with a sense of patriotism and a reverence for the Constitution.<sup>162</sup> Clay stated:

Every early recollection and fixed conviction, every impulse and prejudice even, of his ardent nature allied itself with the institutions of the country; and a veneration for the Constitution and Union of these States was the highest principle—nay, the strongest passion—of his earliest manhood and his latest declining age.<sup>163</sup>

Clay learned those values in many ways—from studying with the Revolution's leaders to living through the Revolution itself.

His soul had been fused down in the camp-fires of the revolution, and like the molten gold, it received a coinage which showed that it was purely American. His voice pleading ever for liberty, had in it the ring of the old revolutionary metal. He was the product of our republican institutions. The genius of his country struck all its forces into his spirit. He was a native of the soil. We think of him as we gaze upon the noble, aboriginal tree which now casts its broad shadows upon us. Its roots pierce the virgin soil. It trails low its boughs to drink the dew. It spreads its branches far and wide. All the elements are its ministers. From the deep mould, from rain and sunshine, from day and night, yea, from all the winds and storms of heaven it elaborates its springing life and its vernal crown. It is the noble growth of the soil—its product and its pride.<sup>164</sup>

#### *D. The Cemetery's Civilizing Mission*

Cemeteries were places where people learned about their obligations to the future, and where they discharged their duties to the past. For burial was a sacred duty, which humans had fulfilled from time out of mind. And the preparation of cemeteries helped to discharge such duties.<sup>165</sup> But it was not just a discharge of a solemn (and one is tempted to say grave) duty. The rural cemeteries also served other civilizing missions in the instruction they provided. Artist Charles Fraser explained during the dedication of Charleston's Magnolia Cemetery in 1850 the many benefits the dead had con-

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160. *Id.* at 21-23.

161. *Id.* at 21.

162. *Id.* at 23.

163. *Id.*

164. *Id.*

165. *Rural Cemeteries*, 3 S.Q. REV. 523 (Apr. 1851).

ferred on the living. They provided examples of virtue, the discoveries and inventions “which are diffusing the blessings of comfort and prosperity throughout the world . . .” and “. . . we owe, not only the foundations of the great fabric of our liberties, but those lessons of wisdom, justice and moderation, upon the observance of which alone can depend its stability.”<sup>166</sup> Those debts could be discharged by tribute in a cemetery. Thus, the cemetery was a place where we discharged our debts—it was something that we owed to those before us and to the country. It was in that way backwards looking, the fulfilling of an obligation. Indeed, a decent burial was “the common debt due from man to his fellow.”<sup>167</sup> Cemeteries were also, however, forward looking places where we taught future generations.

The fullest description of how cemeteries related to human progress came in Cyrus Mason’s address at Dale Cemetery in 1852. Mason, who was a Presbyterian minister and sometimes professor at New York University, started at a meta-level, with a description of human progress. He dealt with the means by which humans achieved dominion over nature; how humans had turned nature to their uses. He turned to the history of human development to illustrate how human ingenuity might conquer nature. “A few hundreds of savages led a poor and wretched life along the Hudson where millions now rejoice in rich abundance.”<sup>168</sup>

That sense of progress then invited the question: how does progress, what he called “social condition,” occur?<sup>169</sup> Improvement required society-wide mobilization. “Every one knows, that life, liberty and property are in hourly dependence on society. If these are not, in the maine [sic], defended, society is deemed a failure . . . .”<sup>170</sup> Mason set on a lengthy demonstration of how social condition depended on moral condition, how morality led to protection of property and commerce and society. He compared the present social condition with that of the colonial era and with feudalism in Europe: “where the king, the soldier, the landlord and the priest, take all the fruits of the people’s labor, except that precise amount, which will keep together the souls and bodies of a people who never cherish the thought of an improved condition.”<sup>171</sup> The present, improved social condition was

166. FRASER, *supra* note 110, at 4-5.

167. William L. Clark, *Address, in* DEDICATION OF MOUNT HEBRON CEMETERY, IN WINCHESTER, VIRGINIA, JUNE 22, 1844; THE ACT OF INCORPORATION BY THE LEGISLATURE OF VIRGINIA IN 1844, AND THE CONSTITUTION AND BY-LAWS OF THE MOUNT HEBRON CEMETERY COMPANY 12, 13 (Winchester, Republican Office 1845).

168. DALE CEMETERY, *supra* note 142, at 18.

169. *Id.* at 19.

170. *Id.*

171. *Id.* at 20.

due to the government, to education, and to natural resources. But it was also dependent on the moral condition of individuals.

Mason thus moved from a society-wide analysis to the individual. His prescription was to take action to improve individuals.

We must adopt and cherish those forms of social action, which have a tendency to make the members of society obtain the mastery over the dangerous elements of nature within themselves, as well as the available elements of nature without them. We must take such measures, and adopt such institutions as are manifestly adapted to make men mindful of the past and regardful of the future, to quicken their tenderest sensibilities, to invigorate their domestic and social affections, to inspire them with an honest pride of ancestry and a deep care of their posterity, to cultivate their taste, and to inflame them with a common sentiment of regard for the honor of their town and their townsmen. These are the germs of a high social condition; give to these a vigorous growth, and you insure a steady progress of the common welfare.<sup>172</sup>

Mason showed that the founding of cemeteries was just that kind of “social action” when he demonstrated the contributions cemeteries made to the mission of individual improvement. The cemetery was about the improvement of the living. Monuments are erected “to teach the living a great lesson of patriotism, to show them how mankind regard those, who by mortal peril found a nation and make it free[.]”<sup>173</sup> The purpose of the cemetery was one of improving individual condition so that social condition, too, was improved:

The true idea, the motive and end of this new, social institution . . . is a permanent and common memorial of the community, in which, each family has its appropriate place, and where the past life and influence of the departed are, in some sense, preserved for the benefit of those who survive.”<sup>174</sup>

The cemetery worked its magic over people in four ways. First, it collected the sentiments of the survivors and gave pride in their family and their country. “Let it be made easy for the day-laborer to own a lot in this Cemetery,” Mason explained, “let him be induced to save by carefulness the price of this lot, and his descendants will be all the more likely to shun the grog-shop, the poor-house and the prison.”<sup>175</sup> Second, the cemetery introduced beauty and order. Third, it introduced a common interest and a common attachment of the people irrespective of “existing divisions into classes, sections, denomina-

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172. *Id.* at 20-21.

173. *Id.* at 21 (“[W]e build here for the living: for the use, the pleasure, the instruction, the edification of the living.”).

174. *Id.* at 22.

175. *Id.* at 23.

tions and political parties.”<sup>176</sup> And finally, the cemetery offered to grow in influence as more people were buried there. “The memory of the just, the wise, the useful will here become precious.”<sup>177</sup>

All of those values together led to the advance of civilization—a phrase used often in discussion of cemeteries and elsewhere in American culture. Advance of civilization was one theme that Story referenced in his Mount Auburn address.<sup>178</sup> In fact, this was a term in wide-spread use at the time. It conveyed the sense of the technological and moral progress Americans had experienced—and conveyed a set of inter-related ideas about the settlement of the continent, the displacement of Native Americans, technological advancements like the steam engines, which conquered space as it also made faster printing possible. Shortly, Americans would add the telegraph to their list of devices that had transformed the country. Law was yet another of the technologies that facilitated settlement; in fact, it was central to advancement for it controlled the passions of humans and provided a stable government.<sup>179</sup> Such ideas were conveyed in graphic terms in the landscape art of the era—such as Asher Durand’s 1853 canvas, *Progress*<sup>180</sup>—and also in a series of books—like E.L. Magoon’s *Westward Empire*<sup>181</sup>—and it was a value widely celebrated in college literary addresses.<sup>182</sup>

That civilizing mission contained important elements of order and stability. Professor Macellus Post, who taught history at Washington University, turned to lessons of history for the evidence of the power that cemeteries held over humans. History taught that cemeteries served to bring stability to human society.

History shows the strength of the power of political conservation, in reverence for the dead, even in cases of its abuse and perversion. The Chinese, whose worship of the dead has conserved an effete civilization for twenty centuries—the Hindoo, whose traditions embalmed in time-defying monuments from the source of the

176. *Id.* at 24.

177. *Id.* at 25.

178. *See, e.g.*, STORY, *supra* note 1, at 13 (explaining the cemeteries can promote “highest purposes of religion and human duty”).

179. *See, e.g.*, Davis & Brophy, *supra* note 70, at 789 (discussing trust as a form of legal technology).

180. *See* ANGELA MILLER, *THE EMPIRE OF THE EYE: LANDSCAPE REPRESENTATION AND AMERICAN CULTURAL POLITICS, 1825-1875*, at 154-58 (1996); Alfred L. Brophy, *Property and Progress: Antebellum Landscape Art and Property Law*, 40 MCGEORGE L. REV. 603 (2009).

181. E. L. MAGOON, *WESTWARD EMPIRE: OR, THE GREAT DRAMA OF HUMAN PROGRESS* (New York, Harper & Bros. 1856).

182. *See, e.g.*, JAMES H. PERKINS, *CHRISTIAN CIVILIZATION: AN ADDRESS DELIVERED BEFORE THE ATHENIAN SOCIETY OF THE UNIVERSITY OF OHIO AT ATHENS, SEPTEMBER SIXTEENTH, 1840* (Cincinnati, A. Pugh 1840).



Ganges to Cape Comorin, have for 3,000 years kept watch over a civilization seemingly as lasting and changeless as the features of the natural world—ancient Egypt, who embalmed herself for ages in porphyry and granite and marble, making the whole Nile valley one cemetery of mausoleum, of obelisk and pyramid—illustrate the power of the principle, though in mis-direction and excess. Greece understood its power—and in temple and grove, and forum and cemetery, in forests of statuary and funeral sculpture, she caused her gifted and glorious dead to speak, from generation to generation, to her brilliant but mobile people.<sup>183</sup>

As with so much of pre-Civil War thinking about the lessons of history, Post found that history taught lessons about the need for stability.<sup>184</sup>

In other places writers casually linked cemeteries with the mission of commerce. For instance, in 1855 Congressman James L. Orr of South Carolina included cemeteries as part of his plan for “Development of Southern Industry” in an article in *DeBow’s Review*.<sup>185</sup> Orr asked for every southern town to have a “cemetery—enclosed with substantial iron railing—laid out in plats and walks, and planted in flowers and evergreens . . . . This would be showing that respect and affection for the memory of the dead due by a civilized and Christian people.”<sup>186</sup> A few years later the Spring Grove Cemetery’s 1857 annual report suggested that monuments were part of the advance of Christian civilization.<sup>187</sup>

### *E. Cemetery as Part of a Christian Republic*

Because rural cemeteries were places of beauty and repose from the market, which nurtured and taught values of Christianity, patriotism and order, they were part of the Christian republic. They operated, as did other private organizations, to support a constellation of ideas about religion, economy, and constitutional order. Orators at the dedication understood this.

Amory Dwight Mayo’s 1858 address at the dedication of Green Hill Cemetery in Amsterdam, northwest of Albany in the Hudson River Valley, provided a detailed sense of the connections of the cem-

183. POST, *supra* note 149, at 18-19.

184. See, e.g., THOMAS R. DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS 484, 562-69, 572-662 (New York, D. Appleton & Co. 1853) (discussing instability in the wake of the French Revolution); see also KUNAL PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM 184-85 (2011) (discussing utility of historical arguments to conservatives in pre-Civil War period).

185. J. D. Orr, *Development of Southern Industry*, 19 DEBOW’S REV. 1, 6-7 (1855).

186. *Id.* at 7.

187. THE CINCINNATI CEMETERY OF SPRING GROVE: REPORT FOR 1857, at 43 (Cincinnati, C. F. Bradley & Co. 1857).

etery to the United States as a nation and to constitutionalism. At the cemetery, it was easy to recall how much civilization had progressed in the generations since the beginning of the eighteenth century. The land was no longer inhabited by Native Americans (who were buried with their faces “turned towards the east, as in prophetic foresight of the coming civilization . . .”).<sup>188</sup> Through “patient fortitude,” the valley’s settlers had “subdued the wilderness” and with “patriotic devotion saved [the valley] for the heritage of freemen.”<sup>189</sup> Mayo then looked to the future to “behold in vision the scene that shall gladden the eyes of your descendants a century and a half from to-day.”<sup>190</sup> Mayo predicted that far-off generations would find “[a] garden valley more enchanting than any Eden of the past, peopled by a race that in power and opportunity shall surpass our largest prophecy.”<sup>191</sup> The cemetery was the best act citizens of the town had ever undertaken, which promised to grow in beauty over the generations and appeal “to the holiest and calmest sentiments of our being, through the spectacle of enchanting natural scenery, and the associations of the beloved on earth . . . .”<sup>192</sup>

Mayo explained that the cemetery was part of establishing the principles of democracy and republicanism because it brought people together in death. The cemetery was, again, a symbol of republicanism and a creator of it:

All things are tending, at least in the more advanced portions of our country, to a broad and pure republicanism, founded on the christian law of love; and what emblem can be more significant of this happy tendency than the American Cemetery, constructed by the money, taste and sentiment of the whole people; containing the dust of the earliest generations removed thither with pious care; receiving the body of every citizen when his earthly work is done, and he steps down from his little eminence of worldly distinction, to mingle with the great democracy of death.<sup>193</sup>

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188. MAYO, *supra* note 144, at 4.

189. *Id.*

190. *Id.* at 4-5.

191. *Id.* at 5.

192. *Id.*

193. *Id.* at 8. Similarly, Augustus E. Silliman’s *A Gallop Among American Scenery* has a chapter on Green Wood Cemetery in Brooklyn. AUGUSTUS E. SILLIMAN, *A GALLOP AMONG AMERICAN SCENERY: OR, SKETCHES OF AMERICAN SCENES AND MILITARY ADVENTURE* 220-31 (New York, D. Appleton 1843).

Mayo's praise for the cemetery was extreme. It was "a powerful aid in teaching the people the christian view of life and death; as a perpetual preacher on the relations of those who live in this world, and in the world of souls."<sup>194</sup>

For Mayo, the cemetery was an important piece part of a larger mission of what he called "a true Christian civilization."<sup>195</sup> Other addresses also took up Mayo's themes, though not quite in as much detail. Reverend Increase N. Tarbox spoke in similar terms at the 1848 dedication of the Framingham Cemetery. He explained that cemeteries amplify the general moral influence that Christianity exercises. Together, the sentiments evoked by the cemetery and Christianity combine to make people more moral, that is more respectful of others and the future. The work of the cemetery would continue and its influence would grow as more people were buried there.<sup>196</sup> At Framingham, Tarbox spoke in general terms; some sense of his ideas about government appear in more detail in an 1843 address at Hamilton College on the "origins, progress, and present condition of philosophy."<sup>197</sup> That address was an attack on idealists, especially Ralph Waldo Emerson, who embodied what Tarbox thought was the "sickly sentiment of men who live apart from the world and whose minds heat and ferment with thought."<sup>198</sup> In fact, Tarbox recalled how far New England had traveled from the days of its founding when pragmatic ideas ruled to the present when idealists like Emerson were corrupting philosophy by reference to cemeteries:

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194. MAYO, *supra* note 144, at 8; *see also id.* at 8-9 ("How impressive is the testimony of the Cemetery to that true equality of man founded on respect for his nature; and that union of all men for the common welfare which is the foundation stone of our national existence. However we may be forced by shallow theories or selfish projects to despise and run over any man or class in the mad struggle of our week-day life, we have only to come up here to be converted from the sin of contempt for Humanity. For in the cemetery all distinctions lie level with the dust. Friend and foe, rich and poor, wise and simple, good and bad, honored and obscure, are all here. . . . From these green graves a voice shall speak to us, saying, 'Man is worthy of respect as man;' and this primal reverence transcends all secondary distinctions. Made in the shape of a common Father; clothed in the dust of the common earth; bound to every spirit by a common nature; destined to a common immortality; the soul demands more reverence than any man can pay. Of all distinctions, but one endures beyond these walls; and this only for the common good of Humanity.").

195. A.D. MAYO, *SYMBOLS OF THE CAPITAL; OR, CIVILIZATION IN NEW YORK* 350 (New York, Thatcher & Hutchinson 1859).

196. INCREASE N. TARBOX, *AN ADDRESS BEFORE THE CITIZENS OF FRAMINGHAM, AND THE NEIGHBORING TOWNS, AT THE CONSECRATION OF THE CEMETERY IN SAID TOWN, OCT. 13, 1848* (Boston, Joseph L. Hallworth 1849).

197. I.N. TARBOX, *AN ADDRESS ON THE ORIGIN, PROGRESS & PRESENT CONDITION OF PHILOSOPHY, DELIVERED BEFORE THE HAMILTON CHAPTER OF THE ALPHA DELTA SOCIETY ON ITS ELEVENTH ANNIVERSARY AT CLINTON, N.Y. 25* (Utica, R.W. Roberts 1843).

198. *Id.*

In New England,—a land of hills and primitive rocks—beneath whose soil seven generations of hardy Saxon men are sleeping — the foundation of whose institutions was laid by hands hardened with toil — whose genius is the genius of utility and practical sense,—in our own New England, a class of men are found who discourse, by the day, of moonlight and starlight and abstract beauty generally; who find a sort of religion in dew-drops and flowers and falling snow-flakes, and manufacture a kind of God out of the spirit of the age. . . .<sup>199</sup>

Instead of the idealists like Emerson, Tarbox respected Anglo-Saxon common sense philosophy—what he called the philosophy of Bacon.<sup>200</sup> Tarbox explained how practical ideas influenced the flow of thought from the high to the low and that is perhaps a model of how a cemetery could influence everyone in a community.<sup>201</sup> Tarbox focused in particular on the centrality of commerce in bringing about progress. This was constitutional theory at very high level of generality—one that focused on the practical and on utility as it sought to promote a commercial republic.<sup>202</sup> Other addresses linked the ways that cemeteries reflected the natural instinct for respect for the deceased with natural law. That is, the cemeteries were a manifestation of natural instincts and natural law.<sup>203</sup> They appealed to the Whig sense of natural justice, which appeared in the Whig desire for legal order.<sup>204</sup>

There is another way of comparing Tarbox and Emerson. It is through Emerson's address at the dedication of the Sleepy Hollow Cemetery in Concord, Massachusetts. Emerson's address has substantially fewer references to God than the others; it is more focused on the beauty of nature; it is more forthright than many addresses in its acknowledgment that cemeteries are about the present. For instance, after discussing that individuals die even as human society continues and that it is impossible to preserve bodies for long, Emerson says that "[o]ur people accepting this lesson from science, yet touched by the tenderness which Christianity breathes, have found a mean in the consecration of gardens."<sup>205</sup> Emerson alludes to the "sim-

199. *Id.* at 23.

200. *Id.* at 22, 30.

201. *Id.* at 10.

202. *Id.* at 28-29.

203. *See, e.g.,* DANIEL APPLETON WHITE, AN ADDRESS, DELIVERED AT THE CONSECRATION OF THE HARMONY GROVE CEMETERY, IN SALEM, JUNE 14, 1840, at 8 (Salem, The Gazette Press 1840) (stating that natural affection for the dead is part of natural law); Edward North, *Dedicatory Address, in CLINTON CEMETERY*, *supra* note 145, at 13, 24 (explaining the natural instinct for justice).

204. *See* HOWE, *supra* note 50, at 411-45 (discussing Whig support for law over Democratic appeals to power).

205. RALPH WALDO EMERSON, *Consecration of Sleepy Hollow Cemetery in* 11 THE COMPLETE WORKS OF RALPH WALDO EMERSON: MISCELLANIES 430 (Boston & N.Y., Houghton, Mifflin & Co. 1904).

ultaneous movement . . . in a hundred cities and towns” to establish rural cemeteries.<sup>206</sup> His focus is on the beauty of nature and the longevity of trees. “What work of man will compare with the plantation of a park?” he asked.<sup>207</sup> This address is classic transcendentalism and thus has less to do overtly with law than a lot of other addresses. Emerson explicitly links the cemetery to the local courthouse, when he says they were both part of “a large block of public ground, permanent property of the town and country.”<sup>208</sup>

The cemetery’s civilizing mission was one piece of a much larger mosaic. That cemeteries were part of the world of the market, commercialization, religion, civic organizations, and reform movements appears perhaps most clearly in Amory Mayo’s book *Symbols of Capital; Or, Civilization in New York*.<sup>209</sup> Published the year after his Amsterdam dedication address, *Symbols of the Capital* places the cemetery into the context of New York culture, for it has chapters on free labor, modern inventions like the canal and railroad, the higher law critique of the fugitive slave act, art, the penitentiary, women’s rights, and churches. All of that was capped off with a final chapter on cemeteries, which supplemented Mayo’s dedication address.<sup>210</sup> Thus in that book we see the cemetery as part of a system of public and private institutions and individual and collective action, all of which pointed towards republicanism founded on Christian principles.<sup>211</sup> Those elements interacted—from art, which served to provide the refinement that is the foundation of the state, to free labor, and human inventions, which improved life and preserved a republican government. At the center of this was commerce, which served as the advance guard of Christianity. “Commerce,” Mayo wrote, “turns out a pioneer of civilization and Christianity. Every blow of the spade or sweep of the mower on the uplands and in the valleys of New York, is felt in the spiritual experience of these who dwell in far-off lands.”<sup>212</sup>

Mayo saw in commerce the workings of God. And he turned to images of commerce to illustrate God’s presence in the United States:

Were I challenged by the skeptics to show my strong reasons for the faith in God, and moral obligation and immortality, I do not think I should detain him in my study among the volumes of dead divines, but I would lead him to the very throbbing heart of this world’s activity, to the decks of those steamers freighted with the

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206. *Id.* at 430-31.

207. *Id.* at 188.

208. *Id.* at 432.

209. MAYO, *supra* note 195.

210. *Id.* at 343-68.

211. *Id.* at 351.

212. *Id.* at 354.

science and burdened with the hopes of two continents. There I would stand, as these messengers ploughed their way through the waves, breasting an ocean of incredulity more chilling than the surges of the cold Atlantic, I would bid him mark the demeanor of those toil-worn men; their fidelity, their silent and sacred obedience to every command, the faith of their leader unsubdued by failure.<sup>213</sup>

Mayo carried the story farther than many. He linked the bustle of American commerce to the cemetery. For the cemetery was nearby the city, though separated from it. It was a place where visitors would think of life rather than death.

How admirable, then, is the sentiment that often places the Rural Cemetery within sight of all the agencies of our new civilization. Walking among its silent graves, you can almost hear the hum of the machinery that crowds the adjacent stream; the meadows are sown and harvested beneath your eye; the spires and roofs of the city gleam in the distance, or the village streets are vocal below; the near river or blue ocean afar glitter with flitting sails; the thunder and the scream of the lightning train startle the echoes of innumerable ravines, and swift as thought, fly tidings of humanity over the glittering wire. All is life around; oh, yes, and there is no death here.<sup>214</sup>

The cemetery, then, was part of a world of the “Christian Republic”<sup>215</sup>—a place where people mixed and where we learned lessons of republicanism. Amory Mayo’s address at Green Hill Cemetery provided the most elaborate explanations of the country’s tendency toward “a broad and pure republicanism, founded on the christian law of love” and how cemeteries functioned to foster that principle.<sup>216</sup>

[The cemetery represented] a most significant type of the great democratic idea, on which our society is founded; as a powerful aid in teaching the people the christian view of life and death; as a perpetual preacher on the relations of those who live in this world, and in the world of souls.<sup>217</sup>

For the cemetery represented “that true equality of man founded on respect for his nature; and that union of all men for the common welfare which is the foundation stone of our national existence.”<sup>218</sup> It illustrated those principles by leveling distinctions.

213. *Id.* at 355-56.

214. *Id.* at 357.

215. *Id.* at 196.

216. MAYO, *supra* note 144, at 8.

217. *Id.*

218. *Id.* at 8; accord BALDWIN, *supra* note 134, at 12-14 (interpreting cemeteries as contributors to republics with their connections to history as well as contemporary culture); see also MARY H. MITCHELL, HOLLYWOOD CEMETERY: THE HISTORY OF A SOUTHERN SHRINE

Friend and foe, rich and poor, wise and simple, good and bad, honored and obscure, are all here. Whatever they may have been or may have done above-ground, our gentle mother earth opens her bosom to the least and greatest alike. However separated by the accidents of conventional society, Nature, the most illustrious hostess, keeps open house for all. From these green graves a voice shall speak to us, saying, "Man is worthy of respect as man;" and this primal reverence transcends all secondary distinctions.<sup>219</sup>

At the cemetery Mayo believed there would be critical lessons about Christian republicanism.

Come to this hill side from the selfish competitions that divide man from man, and learn from the way our mother treats her every child, to reverence all men for their manhood derived from God; to live for each other, counting any superiority of native faculty, a culture, or character, as a trust to be used for the uplifting of the whole; to make society in this community, in our beloved country, one family, bound together by respect for the nature and rights of all—a republic on earth, fit emblem of the kingdom of God in heaven.<sup>220</sup>

Mayo was one of many people who linked Christianity, the market, and Constitutionalism. He was preceded in this by lawyer Oliver Baldwin, who told the audience at the dedication of Richmond's Hollywood Cemetery in June 1849, "Of all the schools of instruction there is none like that which speaks to us from the dust."<sup>221</sup> Baldwin explained the ways that cemeteries evoked religious sentiments:

[T]he Grave, the Grave, how simply but powerfully it speaks through the eye to the soul, and bids it mediate upon itself and its destiny. An ancient writer has said that man was taken from the dust of the earth to prompt him to humility. . . . The lessons which will here be taught are adapted to all conditions of life, and readily suggest themselves to every mind. . . . The votary of wealth may learn a useful lesson when he sees the purple robe of the rich exchanged for the unsightly shroud, and the man who fared sumptuously every day become himself a banquet for worms. The sons of sorrow and of poverty may come here not to mourn, but to be comforted; to be reminded that troubles, like pleasures, have an end; and that for the meek and pure in heart the grave is but the gate to ceaseless felicity above. Even the man of an evil nature may perhaps be touched with solemn awe when, whether he reject Divine Revelation or not, he sees around him a thousand incon-

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26 (1985) (discussing Peter Mayo's injunction against sale of the lots); *Hollywood Cemetery*, RICHMOND ENQUIRER, June 29, 1849, at 1 (discussing absence of political talk in Baldwin's address, which emphasized equality of humans).

219. MAYO, *supra* note 144, at 8-9.

220. *Id.* at 9.

221. BALDWIN, *supra* note 134, at 11.

testable evidences that *Sin* is in the world, and *Death* by Sin. . . . Here may the Christian stand and look upon the monument of his departed friend as his own lighthouse to the harbor of eternal rest.<sup>222</sup>

### *F. Whig Constitutionalism Within and Beyond the Cemetery*

Whig politician Daniel Dewey Barnard made the most explicit connection between nature, art, and constitutional values of any cemetery orator. Barnard, who was a constant figure in New York politics from the 1830s through the 1850s and a staunch defender of property rights during the New York anti-rent movement,<sup>223</sup> spoke in other addresses about the need for protection of property rights,<sup>224</sup> and the important role that the government played in establishing order.<sup>225</sup> At the Albany cemetery, though, Barnard emphasized the particular place of the cemetery's natural setting and the possibilities of further cultivation in order and uplift.

The grounds where we are now assembled have been selected for a cemetery . . . with a special view to their natural beauty, and their capability of improvement after the manner of landscape gardening. . . . Think of all this natural beauty at once fully brought out and softened by the hand of art—at once heightened, yet subdued by the civilizing and humanizing processes to which it may be subjected—and then think of it inhabited only by the dead; here and there a grave, or a group of graves; some in one lovely spot, some in another . . . . What scene in nature could be more beautiful, more attractive, more impressive, more improving!<sup>226</sup>

Where Barnard's Albany address operated at a high level of generality with respect to constitutionalism, we can see how Barnard's constitutional world fit together in some of his other addresses, such as the address he delivered in 1839 at Amherst College. At Amherst, Barnard drew the connections between Christianity and the Constitution.<sup>227</sup> And in an 1846 address at the University of the City of New York, Barnard credited four key events in shaping a solid American character: "We have the Bible, and the Reformation, and the American Revolution, and the Constitution of the United States."<sup>228</sup> In the

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222. *Id.* at 11-12.

223. CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865*, at 15-16, 228-31 (2001).

224. DANIEL D. BARNARD, *AN ADDRESS DELIVERED AT AMHERST, BEFORE THE LITERARY SOCIETIES OF AMHERST COLLEGE, AUGUST 27, 1839*, at 43, 53 (Albany, Hoffman & White 1839).

225. *See generally* BARNARD, *supra* note 100.

226. BARNARD, *supra* note 148, at 28-29.

227. BARNARD, *supra* note 224, at 6.

228. BARNARD, *supra* note 100, at 7.



United States the public mind acted a stabilizer, to “keep society firm and assured, and enable it to throw back, as from a rock based in deep unfathomed earth, all the shocks which the restless, the speculative, the bigoted or the fanatical may direct against it.”<sup>229</sup> In that search for stability—Barnard called his lecture a “plea for social and popular repose”—the cemetery could be one of the many elements.<sup>230</sup>

Barnard developed his political philosophy perhaps most fully in an address, “Man and the State, Social and Political” to the Yale Phi Beta Kappa Society in 1845. Barnard spoke of his concern that the well-educated ought to use their talents for the “genial, gentle, suasive influence over the popular mind . . . .”<sup>231</sup> His mission was a search for eternal truth amidst the “age of reform.” His address was on the “relation of the state and of governments to the subject of the Moral condition and Progress of man.”<sup>232</sup> The state was based on an unwritten social constitution that helped define the “political estate”—the group of political actors who in turn formed a written constitution. Barnard wanted civil society to overcome what he called “political materialism,” in which physical and material impulses led to a tyranny of the majority’s wishes.<sup>233</sup>

Barnard’s Yale address touched on a central issue: how to mold and shape humans for progress? And while often addresses spoke of an individual’s duty, such progress occurred through society, through legal forms, through actions of the state, the family, and private organizations. “Men find themselves every where, not merely existing by the side of other men, but associated every where with other men, in various relations.”<sup>234</sup> It was the social and the political state that could organize and develop human morality, for “[m]an does not exist alone.”<sup>235</sup>

Barnard’s political theory justified, indeed depended upon, a “higher constitution” than mere numbers. It was a sense of patriot-

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229. *Id.* at 7-8.

230. DANIEL D. BARNARD, A PLEA FOR SOCIAL AND POPULAR REPOSE: AN ADDRESS BEFORE PHILOMATHEAN AND EUCLEIAN SOCIETIES OF UNIVERSITY OF THE CITY OF NEW-YORK, JULY 1, 1845 (New York, Tribune Job Printing 1845). Barnard wrote against the anti-rent movement and spoke about the problems of excesses of democracy and attacks on property numerous times. See generally, e.g., DANIEL D. BARNARD, A DISCOURSE DELIVERED BEFORE THE SENATE OF UNION COLLEGE ON THE 24TH DAY OF JULY, 1843 (Albany, Weed & Parsons 1843); DANIEL D. BARNARD, A DISCOURSE ON THE LIFE, SERVICES AND CHARACTER OF STEPHEN VAN RENSSELAER: DELIVERED BEFORE THE ALBANY INSTITUTE, APRIL 15, 1839 (Albany, Hoffman & White 1839) (attacking early anti-rent movement); D. D. BARNARD, A DISCOURSE PRONOUNCED AT SCHENECTADY: BEFORE THE NEW-YORK ALPHA, OF THE SOCIETY OF PHI BETA KAPPA, JULY 25TH, 1837 (Albany, Hoffman & White 1837) (urging support for law instead of excesses of democracy).

231. BARNARD, *supra* note 100, at 6.

232. *Id.* at 8.

233. *Id.* at 6-7, 36-38.

234. *Id.* at 8.

235. *Id.* at 11.

ism, Christian duty, and morality.<sup>236</sup> Law was an adjunct to Barnard's vision of "personal Morality." Together the laws and such personal morality formed "a Code of National Morality."<sup>237</sup> Given the centrality of law to the country's definition and maintenance of morality, Barnard identified the terms where there might be progress—it had "to be done in the state and under the state."<sup>238</sup> Barnard looked forward to the day when the state, aided by Christianity, would head off for "moral renovation, reform, and progress."<sup>239</sup>

Law was also central because it was about setting boundaries on popular will. He wrote the leading defense of the feudal tenures that were attacked during the New York Anti-rent movement. Barnard saw the movement at base as an appeal to "public licentiousness," akin to other popular movements that tended to destroy respect for law.<sup>240</sup> He appealed to the Constitution and to a return to principles of respect for property and principles in place of those of who "look to the end, and . . . easily quiet themselves about the means."<sup>241</sup> Those popular appeals led to the movement. "There seems to be nothing so intrinsically base or wicked, that respectable and apparently well-meaning persons may not be found to encourage and support it, provided only it have the sanction of numbers in its favor."<sup>242</sup>

Though these ideas do not have the sophistication that we often associate with constitutional theory in places of high culture like the floor of the United States Senate<sup>243</sup> and the pages of the Supreme Court's decisions,<sup>244</sup> works like Barnard's and Mayo's addresses allow us to see how contemporaries fit the cemetery into their world. The cemetery emerges as one piece of a complex system that saw the Reformation and the American Revolution, and the Revolution's result—a Constitutional republic—as the center of the American nation.<sup>245</sup> Progress in morals was bound up with progress in economics,

236. *Id.* at 36-38.

237. *Id.* at 40; *accord id.* at 39-40.

238. *Id.* at 43.

239. *Id.* at 45.

240. D. D. Barnard, *The "Anti-Rent" Movement and Outbreak in New York*, 2 AM. REV. 577, 587 (1845).

241. *Id.* at 578.

242. *Id.* at 580.

243. See generally DANIEL WEBSTER, SPEECH OF THE HON. DANIEL WEBSTER ON THE SUBJECT OF SLAVERY: DELIVERED IN THE UNITED STATES SENATE ON THURSDAY, MARCH 7, 1850 (Boston, Redding & Co. 1850) (supporting the Fugitive Slave Act of 1850 as part of a constitutional compromise over slavery).

244. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 440-48 (1857) (finding the Constitution protects slavery in the territories).

245. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 (2009) (focusing on constitutional republic as one of the key outcomes of the Revolution); MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE (1998) (focusing on constitutional ideas of anti-slavery advocates in the era of

and always it was Christianity—of which the cemetery was a key part—at the center of this progress. The Erie Canal, steam boats, railroads, the telegraph, women’s domestic sphere that elevated culture, fine art, free labor, the reform of prisons, and the cemetery—all these were parts of the same culture and they worked together in the Christian mission.<sup>246</sup> This was why Elias W. Leveanworth, the president of Syracuse’s Oakwood Cemetery, found the cemetery a necessary—though often missing—piece of progress of the age.<sup>247</sup>

At a high level of generality, then, cemeteries functioned to promote republican values. They taught lessons about the early Republic, about change over centuries. Their monuments’ inscriptions as well as the historical importance of their setting and the beauty of their landscaped gardens inspired citizens to more moral thinking. But in other ways the cemetery was part of the mission of creating a republican government. In 1853, shortly after the dedication of the Hollywood Cemetery, Richmond’s periodical *Southern Literary Messenger* (“*Messenger*”) wrote of the need for permanent rural cemeteries. When children moved away from their ancestral homes, family cemeteries fell into disrepair; perhaps they were even forgotten entirely and often the cemeteries fell to development and farming. “Change is the order of the day” was the explanation.<sup>248</sup> Where in England families would stay and thus were able to provide care for family plots, in the United States things were entirely different. Because of the constant migration, “[t]he father plants and the stranger to his blood and family waters.”<sup>249</sup> There could not—indeed should not—be laws prohibiting development.<sup>250</sup> This led the *Messenger* to ask whether the problem of the desecration of family cemeteries could “be remedied without an abrogation of a policy so essentially necessary to the freedom and prosperity of our country?”<sup>251</sup> It could, if there were a place where the dead would be cared for in perpetuity. “[T]hese great and beautiful republics of the dead” served that purpose.<sup>252</sup>

It was not just that cemeteries inspired patriotic sentiments; they actually were examples of democracies and republics. Rural cemeter-

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slavery and the Civil War and how the Constitution was unable to constrain or “solve” the conflict over slavery).

246. MAYO, *supra* note 195, at 196.

247. OAKWOOD CEMETERY, *supra* note 23, at 20.

248. *Memorials of the Dead*, 19 S. LITERARY MESSENGER 543, 543 (1853).

249. *Id.*

250. *Id.* at 544 (“The character of our institutions forbid a change in our laws and nature demands, as well as the good of society, that they shall not be altered.”).

251. *Id.*

252. *Id.* Similarly, counsel for the City of Hannibal, Missouri, arguing in favor of eminent domain in 1852 used similar phrasing: “A grave yard is not private property, but belongs to the great ‘Republic’ of the dead.” *City of Hannibal v. Draper*, 15 Mo. 634, 635 (1852).

ies brought everyone together regardless of religious affiliation. There was a democracy in cemeteries, where rich and poor mingled. The lawyer John Thompson, who was elected to the U.S. House of Representatives in 1856 as a Republican, spoke of such democracy in cemeteries in his 1854 dedication address at Poughkeepsie's Cemetery:

Here the rich and the poor—the lofty and the lowly; friends and foes, meet and mingle in a fellowship that knows no rivalries; admits of no distinctions. Whatever the affection or opulence of survivors may erect, “of storied urn, or animated bust,” to mark the merit of the lost—the dwellers in this quiet city of the dead, will experience no difference—rank and precedence are unknown, and peace sits enthroned in every chamber of these silent realms.<sup>253</sup>

Orators like Daniel Barnard and Amory Mayo realized that cemetery dedication addresses were part of a world of Whig thought about constitutionalism, law, patriotism, order, and even beauty. Together those ideas amplified each other. The cemetery addresses and the cemeteries themselves were part of implementing an ordered republic, which was a place of moral and economic growth. When we seek to understand their world and the place of the Constitution in it, we see that many institutions came together to create that orderly world of subordination to law. The legal form of the corporation was used to create and maintain cemeteries and, thus, the corporate form served constitutional purposes.

#### IV. THE CEMETERIES' LEGAL METHODS: PRIVATE CORPORATION AND PUBLIC REGULATION

Justice Joseph Story spoke not only about lessons of sentiment and constitutionalism. His speech also dealt with the seemingly mundane issue of the cemetery's legal authority, its charter from the Massachusetts Legislature.<sup>254</sup> Indeed, the pamphlet version of Story's address printed shortly after his speech also had the cemetery's organic act and its rules for operation, which included instructions on how to assign lots and the varying levels of rights among owners.<sup>255</sup> The cemetery was a triumph of the corporation, which assembled money from investors for a purpose of eternal preservation. In fact, Story emphasized the perpetual nature of Mount Auburn.<sup>256</sup> In an era when charities were feared by many precisely because they were per-

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253. John Thompson, *Address, in THE POUGHKEEPSIE RURAL CEMETERY, ITS BY-LAWS, RULES AND REGULATIONS AND THE DEDICATION CEREMONIES* 10, 18 (Poughkeepsie, Platt & Schram's Steam Prtg. Establishment 1854).

254. STORY, *supra* note 1, at 18-19.

255. *Id.* at 24-25.

256. *Id.* at 19, 22.

petual,<sup>257</sup> this was an extraordinary moment. There were two aspects of the rural cemetery that dealt rather directly with law, though Story only dealt with the first one in his 1831 Mount Auburn address. The first was the corporate form, which was authorized first by special legislative act and then, later, by a general incorporation statute for cemeteries. The second and in many ways more important one was the power of the state to regulate burials for the public good.

### A. *Corporate Form and Public Good*

Pharcellus Church's 1839 dedication address at Rochester explained in more detail how the corporate form worked. The cemetery corporation was established to provide for the perpetual upkeep of the grounds, because the profit from the sale of the land went into a fund for preservation of the cemetery.

By a wise provision, the lots here sold will be secured to the purchasers forever, under such circumstances too, as to afford every assurance, that, should their families remove to the ends of the earth or become extinct, the graves of their friends will be respected and will share in the general improvements which the grounds may be expected to receive. And, to what a pitch of perfection may these grounds be carried, by allowing due scope to art in improving the advantages of nature! . . . [I]t is pleasant to reflect that a laudable desire of providing for the dead, has determined our corporation to devote all the proceeds from the sale of lots, after paying the debts contracted in the purchase, to improvements. By duly prosecuting this noble design, our cemetery will become the brightest ornament of our city, and be able to vie with any thing of the kind on the surface of the globe. . . . How may avenues and walks be cut in every direction, among the thick trees and tortuous ravines, to make way for the solemn procession, or the contemplative traveler to spend an hour of pensive musing and awful converse with eternity!<sup>258</sup>

This was an instance in which the private corporation contributed to public good. So much so, in fact, that the New York legislature passed an act for the general incorporation of cemeteries in 1847.<sup>259</sup> Professor Cyrus Mason of New York University told the audience at

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257. See, e.g., *Am. Bible Soc'y v. Noble*, 11 S.C. Eq. (3 Rich. Eq.) 156 (S.C. App. Eq. 1859), 1859 WL 4395 (discussing mortmain statutes and the reasons why the concentration of property in hands of churches had proven a problem in the United Kingdom); *Gallego v. Attorney Gen.*, 30 Va. (3 Leigh) 450 (1832), 1832 WL 1845 (detailing Virginia's opposition to concentration of property in hands of churches).

258. CHURCH, *supra* note 121, at 18.

259. Act of April 27, 1847, ch. 133 1 LAWS OF THE STATE OF NEW-YORK, PASSED AT THE FIRST MEETING OF THE SEVENTIETH SESSION, OF THE LEGISLATURE, BEGUN AND HELD THE FIFTH DAY OF JANUARY, 1847, AT THE CITY OF ALBANY 125 (Albany, Charles Van Benthusen 1847) (An Act authorizing the incorporation of Rural Cemetery Associations); see also

Dale Cemetery near Sing Sing in 1852 that the New York statute was designed to increase cemeteries.<sup>260</sup> Mason thought a public service is performed by corporation.<sup>261</sup>

Robert Cochran, another speaker at the Dale Cemetery dedication, praised the New York legislature even more than Mason. Cochran found that the legislature had acted in keeping with the "spirit of the age" with the incorporation statute because it guaranteed the cemetery plot against creditors:

With a wise and humane policy, that reflects the greatest honor upon that dignified body, the Legislature of this State have recently enacted laws encouraging the Incorporation of Rural Cemeteries, and throwing around them certain important sanctions and immunities. Under the protection of these beneficent enactments, the poor laborer in the lowlier walks of life, as well as the more favored and prosperous, may here, cheaply, purchase his little plot of ground for the final abode of himself and those whom he loves, and hold it without fear. The hard and unrelenting grasp of the creditor cannot shake his tenure. No public taxes, rates, or assessments can be imposed, by civil authority, upon his estate. Having hallowed the soil, by interring in it one pale form of kindred dust, he has set the seal to his possession, and not even his own act, in a moment of desperate madness, can wrench it from him.<sup>262</sup>

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Act of ..., LAWS OF WISCONSIN TERRITORY, PASSED BY THE FOURTH LEGISLATIVE ASSEMBLY, AT MADISON, THE SEAT OF GOVERNMENT, COMMENDING ON THE THIRD DAY OF DECEMBER, A.D. 1843, AND ENDING JANUARY, A.D. 1844 WITH AN APPENDIX CONTAINING RESOLUTIONS PASSED AT THE SAME SESSION 237-41 (Madison, W.W. Wyman 1844) (An Act to provide for the incorporation of rural cemetery associations); Act of March, 1851, LUCIUS Q.C. ELMER, A DIGEST OF THE LAWS OF NEW JERSEY 80-82 (Philadelphia, J.P. Lippincott 1855) (An Act authorizing the incorporation of rural cemetery associations); Act of February 24, 1848, ch. 867, 2 PUBLIC STATUTES AT LARGE OF THE STATE OF OHIO 1443 (Cincinnati, Maskell Curwen 1858) (An Act making provision for the incorporation of cemetery associations); Act of February 14, 1855, ch. 487, A COMPILATION OF THE STATUTES OF THE STATE OF ILLINOIS, OF A GENERAL NATURE 271-72 (Chicago, Keen & Lee 1856) (An Act to provide for the incorporation of cemetery associations by general law); Act of April 18, 1859, ch. CCLXVII, THE STATUTES OF CALIFORNIA PASSED AT THE TENTH SESSION OF THE LEGISLATURE. 1859, at 281-85 (Sacramento, John O'Meara 1859) (An Act to authorize the incorporation of rural cemetery associations); Act of June 4, 1861, GENERAL LAWS OF THE STATE OF KANSAS 86-87 (Lawrence, Kansas State Journal 1861) (An Act to provide for the incorporation of cemetery associations); Act of February 6, 1845, ch. XXVII, 10 LAWS OF THE STATE OF DELAWARE 27-29 (Dover, S. Kimmey 1845) (An Act to establish the Wilmington and Brandywine cemetery); Act of January 19, 1846, ch. CCCLIV LOCAL LAWS OF THE STATE OF INDIANA 344 (Indianapolis, J.P. Chapman 1846) (An Act to incorporate the Madison cemetery); Act of March 29, 1844, ch. 94, LAWS OF THE STATE OF NEW YORK 85 (Albany, C. Van Benthuyzen 1844) (An Act to incorporate the Wheatfield cemetery association); NEEM, *supra* note 20, at 77 (discussing growth of charters for charitable corporations).

260. DALE CEMETERY, *supra* note 142, at 37.

261. *Id.* at 25.

262. *Id.* at 37-38.

This was yet another instance of the use of public power to encourage private action for public good. Amory Mayo mused in 1858 that there was yet incalculable public good that would emerge from the cemetery. The community did not yet know the size of its debt to the cemetery's creators.<sup>263</sup> Others mused on that question as well. "The *moral effect* of this one burial place no one can anticipate or describe," Reverend Gillette said in 1858.<sup>264</sup> Yet he was certain the value would be greater than the cost. "It will be alone more than sufficient to repay the anxiety, expense and toil its respected projectors have bestowed upon it, and will redound with benefits untold, upon their children and their children's children, even to the remotest generations."<sup>265</sup>

New York Judge David Buel spoke in some detail about the 1847 New York Cemetery statute at the dedication of Troy's Oakwood Cemetery in 1850. He discussed the ways that the statute protected cemeteries from tax assessment, protected buyers of individual lots from their creditors. Moreover, once someone was buried there, their relatives could never sell the lot. It also limited the power of cemeteries to spending the money they collected for the preservation and improvement of the cemetery. "Thus the law provides that by no change of circumstances, by no pressure of poverty which may overtake the first proprietor . . . can he or his descendants, ever be deprived of their last earthly home."<sup>266</sup> Buel concluded, "The law makes this inheritance of the dead a sacred charity."<sup>267</sup>

The rural cemeteries used corporate form (and celebrated it with their publication of charters) to do something that Whigs urged on individuals and on educational institutions—bring the nation together to celebrate the past and have moral uplift.<sup>268</sup>

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263. See generally MAYO, *supra* note 195.

264. WOODLANDS CEMETERY, *supra* note 122, at 48.

265. *Id.*

266. DAVID BUEL, JR., AN ADDRESS DELIVERED AT THE CONSECRATION OF OAKWOOD CEMETERY, OCTOBER 16, 1850, at 12-13 (Troy, John F. Prescott 1850).

267. *Id.* at 13.

268. The rural cemeteries confirm the role of private, collective action for public good and for the promotion of values. See, e.g., 3 JOSEPH STORY, *Rights of the Fellows of Harvard College*, in 3 MISCELLANEOUS WRITINGS OF JOSEPH STORY 298-339 (Boston, Little & Brown 1852); see also ALBRECHT KOSCHNIK, LET A COMMON INTEREST BIND US TOGETHER: ASSOCIATIONS, PARTISANSHIP, AND CULTURE IN PHILADELPHIA, 1775-1840 (2007); Scott Gregory Lien, *Contested Solidarities: Philanthropy, Justice, and the Reconstruction of Public Authority in the United States, 1790-1860* (2006) (unpublished Ph.D. dissertation, University of Chicago) (on file with author). For the rural cemetery was a public civic association that all might join and that all might benefit from. It was part of a robust spirit of charitable corporations in the Northeast. Cf. PETER DOBKIN HALL, *INVENTING THE NONPROFIT SECTOR* 32-36 (1992) (discussing antebellum institutional and philanthropic culture); KATHLEEN MCCARTHY, *AMERICAN CREED: PHILANTHROPY AND THE RISE OF CIVIL SOCIETY* 123-43 (2003) (discussing Jacksonian Democracy's conflicts with philanthropy); Peter Dobkin Hall, *What the Merchants Did with Their Money: Charitable and Testamentary Trusts in Massachusetts, 1780-1880*, in *ENTREPRENEURS: THE BOSTON BUSINESS*

Many of the dedication pamphlets contained the cemeteries' rules, the deeds that they gave to purchasers, their charters, and sometimes even the state acts that authorized the creation of cemeteries.<sup>269</sup> Why was there an elaborate legal literature regarding the rural cemeteries and why was it often linked to the dedication ceremonies? This was part of a larger movement to legitimize through public discussion the organic act. The public organic act was a badge of honor, as well as an element of legal technology. Moreover, the charters served to give notice to the lot owner of the procedures that the cemetery corporations needed to follow. The cemetery rules served notice to all interested in the cemetery of the proper behavior and the rules that they must follow and that the cemetery needed to follow as well.

The charters and financing—for instance, some of the public cemeteries were financed through public bonds—are designed to make the cemeteries permanent. Charters tell us this, and the promotional literature emphasizes that this is about perpetual memory, not profit.<sup>270</sup> Occasionally orators also explained in some depth the importance of the cemetery charters in promoting the purposes of the cemeteries—in preserving them free from taxes, protecting the assets, so that the cemetery could continue forever, and in protecting the lots of individual owners from their debts. “It is to be rejoiced over that in opening this, our Rural Cemetery,” said Edward North, who taught Greek at Hamilton College, at the dedication of the Clinton, New York Cemetery in 1857, that “we are able to embody in its

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COMMUNITY, 1700-1850, 365, 403-16 (Conrad Edick Wright & Katheryn P. Viens eds., 1997) (discussing Boston philanthropy funded via testamentary trusts in the nineteenth century); Johann Neem, *Politics and the Origins of the Nonprofit Corporation in Massachusetts and New Hampshire*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 344-65 (2003).

269. See, e.g., *Act of Incorporation*, in DANIEL APPLETON WHITE, AN ADDRESS, DELIVERED AT THE CONSECRATION OF THE HARMONY GROVE CEMETERY, IN SALEM JUNE 14, 1840, at xii-xv (Salem, The Gazette Press 1840); CLINTON CEMETERY, *supra* note 145, at 37-40 (incorporation act); FORT HILL CEMETERY ASS'N., *supra* note 128, at 61-62 (state charter); HUMPHREY, *supra* note 132, at 31-32 (incorporation act); WILSON M'CANDLESS, FIRST REPORT OF THE MANAGERS OF ALLEGHENY CEMETERY: TOGETHER WITH THE CHARTER OF THE CORPORATION; ITS RULES, REGULATIONS, LOT HOLDERS, &C. ALSO, A FUNERAL ADDRESS ON THE OCCASION OF RE-INTERRING THE REMAINS OF COM. JOSHUA BARNEY & LIEUT. JAS. L. PARKER 23-26 (Pittsburg, Johnston & Stockton 1849) (charter); OAKWOOD CEMETERY, *supra* note 23, at 68-79 (printing cemetery rules and New York's incorporation statute); THE POUGHKEEPSIE RURAL CEMETERY, ITS BY-LAWS, RULES AND REGULATIONS AND THE DEDICATION CEREMONIES (Poughkeepsie, Platt & Schram 1854); REGULATIONS OF THE BALTIMORE CEMETERY WITH SUGGESTIONS TO LOT-HOLDERS, AND THE ACT OF INCORPORATION, 1850, at 19-23 (Baltimore, John Murphy & Co. 1850) (charter); REGULATIONS OF THE LAUREL HILL CEMETERY, ON THE RIVER SCHUYLKILL, NEAR PHILADELPHIA; THE ACT OF INCORPORATION BY THE LEGISLATURE OF PENNSYLVANIA IN 1837; AND A CATALOGUE OF THE PROPERTIES OF LOTS TO FEBRUARY 1, 1846, at 12-14 (Philadelphia, C. Sherman 1846) (act of incorporation).

270. CLEAVELAND, *supra* note 129, at 3; see also CHURCH, *supra* note 121, at 18 (noting that cemeteries will be preserved forever, no matter where descendants live).



organic regulations ideas of permanence and sacred use.”<sup>271</sup> North went on to explain how the cemetery’s charter reflected the purposes of its founders in preserving the cemetery.

No mercenary or speculative views can ever thwart the sacred purpose of our Cemetery Association, by controlling the action of those who serve as its Trustees. The law under which the Association is formed, requires that after the payments for purchase money are made, all its revenues shall be expended in improving and keeping the grounds, and for no other purpose. By a wise provision of statute the title to this soil once made perfect, becomes inalienable. The property of the Association is exempt from all public taxes, rates and assessments. It is not liable to be sold on execution, or for the payment of debts due from individual proprietors. After the title of a plat has been transferred to an individual and an interment made therein, the plat becomes his inalienable property, descending to his heirs and their heirs forever, or so long as they choose to retain it. No sheriff’s writ can ever deny our right to sleep here after death, with our fathers and descendants, unmolested.<sup>272</sup>

Professor Mason praised the proprietors for taking action for public benefit:

[W]e come to celebrate the opening to the public of an enterprise set in motion, for purposes of private gain as well as public benefit. These two features are desirable in every public enterprise. In the best state of society there would be no room for gratuities because none would need them. The nearer we can approach this state of things the better. Every proprietor here will walk uncringing through these grounds, because he has paid his share of a full remuneration to the company. And yet there will be room in his heart for deep and manly gratitude to those citizens, who set on foot this enterprise. For there is always required a sort of daring and superior forecast in those, who project and execute important

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271. CLINTON CEMETERY, *supra* note 145, at 15.

272. *Id.* at 15-16. Professor North articulated why the cemetery charter was so important: all too often churches were closed and converted to new uses.

In this age of abrupt changes, revolutions and runnings to and fro, when household altars are set up to-day and destroyed to-morrow, when a church is consecrated this year for sacred worship, and next year sold for a theatre or a barn, when even religious principles are pulled up, now and then, as children pull up the shrubs they have planted to see if they have taken root, it is pleasant to be permitted to organize a Cemetery that carries the elements of durability and the permanent expression of a sacred purpose. It is pleasant and grateful to know that our right to an inviolable burial-place, or GOD’s Acre, into whose furrows we shall all be cast, is respected by the laws of the State; and that nature herself consents to co-operate with us in doing deathless honor to the dead.

*Id.* at 16.

social projects. They step out in advance of their fellow citizens, and do a service, which, but for them, would not be done; they act against the fears of their friends, and (sometimes) against the sneers of the bystanders; and they take all the chances of a failure. When their project is successful, they create, by their action, the benefit they confer; they bring into existence and distribute to the people large measures of tangible wealth, or of social advantage, which lays none under any painful pecuniary obligation. They enrich others without becoming poorer themselves.

Such men are the highest order of benefactors. Their reward comes slowly, because their service to mankind comes slowly into view, and is gradually appreciated; but time is the sure friend of men of genius and enterprise, and their reward is as sure as the revolutions of the earth, and as large as the justice of unbiased minds.<sup>273</sup>

Yet even as many celebrated the role of private corporations in the working of public good, others urged that cemeteries be undertaken by the public. Hon. John B. Wilkins' 1852 address at the West Roxbury Cemetery celebrated the public good that the private cemetery corporation.<sup>274</sup> The public role that was served by private action. But Wilkins also urged public action.<sup>275</sup>

The addresses sometimes even turned to the language of property to describe the cemeteries. "[T]he dead should have a *permanent freehold*—precincts fortified against the world's enterprise, that would invade their home, and would treat their bones as encumbrances upon the rights of property and on the spirit of improvement."<sup>276</sup>

But for most orators, the nature of the law's protection for cemeteries was of less importance than that it preserved the cemeteries. The process was less important than the result. And it was law working in conjunction with sentiment that ensured the preservation. At the Cave Hill dedication in 1848, Edward Humphrey linked corporate and property law with public sentiment to ask for protection of the cemetery. "The authority of the law, and the public sentiment and conscience, must be successfully invoked to guard our graves from

273. DALE CEMETERY, *supra* note 142, at 25-26.

274. JOHN H. WILKINS, *Introductory Remarks, in* MOUNT HOPE CEMETERY IN DORCHESTER AND WEST ROXBURY: WITH THE EXERCISES AT THE CONSECRATION, THURSDAY, JUNE 24, 1852, at 7 (Boston, Crosby, Nichols & Co. 1852); *see also* MARSHALL FOLETTA, COMING TO TERMS WITH DEMOCRACY: FEDERALIST INTELLECTUALS AND THE SHAPING OF AN AMERICAN CULTURE (2001); *Public and Private Charities of Boston*, 61 N. AM. REV. 135-59 (1845).

275. WILKINS, *supra* note 274, at 7-8.

276. CHARLES F. MAYER, SKETCH OF LOUDON PARK CEMETERY: ITS DEDICATION, AND ADDRESS OF THE HON. CHARLES F. MAYER, DELIVERED ON THAT OCCASION 17 (Baltimore, The Printing Office 1853).

the cupidity of our survivors.”<sup>277</sup> This illustrates the ways that Whigs joined the technology of law with their culture to accomplish the civilizing mission. It is important to see legal thought and legal forms working in tandem with less visible factors like moral force to create an American culture.

Cemeteries brought order and improvement upon nature through the extensive regulations regarding decorum. Yet, such laws designed to bring order to cemeteries were unnecessary, because of the reverence that existed for cemeteries. “Such institutions of themselves appeal so forcibly to the better instincts of our nature, and raise up so spontaneously sentiments of respect in the human bosom,” Whig politician and novelist John Pendleton Kennedy said at the dedication of Green Mount Cemetery in Baltimore in 1839, “as to stand in need of little rigor in the enforcement of the laws necessary to guard them against violation.”<sup>278</sup>

Similarly, orators frequently noted how cemeteries joined public good with private enterprise. New York Supreme Court Judge William J. Bacon, in commenting on the efforts that Syracuse’s citizens made—including re-routing a plank road—to create their cemetery, thought it “honorable alike to the public spirit and the private enterprise that have been engaged in its acquisition.”<sup>279</sup> Bacon believed that nature would combine with human efforts to beautify the cemetery. “Nature has done much, but taste, and skill, and affection, will do still more in the future years of its history to make it a very Mecca of the mind and heart.”<sup>280</sup> Similarly, Professor Edward North commented in 1857 that “[w]e propose to embody this faith in a public enterprise that invites the sympathy and co-operation of all our citizens.”<sup>281</sup>

### *B. Regulation of Burial for Public Good*

Beginning in the 1820s, many cities moved to prohibit interments in city graveyards. That led to legal challenges. The first was in New York, where the Brick Presbyterian Church challenged the city’s prohibition of interment as a violation of the church’s property rights.<sup>282</sup> Although the city won that case with the argument that the

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277. HUMPHREY, *supra* note 132, at 10.

278. John P. Kennedy, *Address at the Dedication of Green Mount Cemetery, July 13, 1839*, in OCCASIONAL ADDRESSES 111, 119 (New York, G. Putnam 1872).

279. OAKWOOD CEMETERY, *supra* note 23, at 37.

280. *Id.* Bacon thought that in the cemetery, the voices of the dead will speak to the living. *Id.* at 36.

281. NORTH, *supra* note 148, at 19.

282. HENDRICK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 74-80 (1983).

prohibition was a reasonable exercise of its police power—an argument used frequently afterwards to justify many regulations—other churches continued to challenge similar restrictions. In 1839, Charleston, South Carolina's Mayor Henry Laurens Pinckney issued a report discussing the evidence that city burials were a health hazard. He suggested that even if they were not a nuisance, rural cemeteries were desirable for other reasons like their pastoral and peaceful setting.<sup>283</sup> Pinckney was an embodiment of these norms of self-sacrifice and Union above individual, for he had sacrificed his rising political career to oppose nullification in his home state and thus cost himself his seat in Congress in 1834. He wrote about these values of patriotism, Union, and constitutionalism in a literary address for the University of North Carolina in 1836, as radical politics in South Carolina pushed him from the scene.<sup>284</sup> Pinckney's report did not settle the dispute, however, and in 1850 the South Carolina Supreme Court upheld the constitutionality of Charleston's prohibition on interment in the city. The ordinance had been challenged by churches claiming—as the Brick Presbyterian Church had twenty years before in New York<sup>285</sup>—that the ordinance deprived them of their property rights.<sup>286</sup> As late as 1854, the Illinois Supreme Court upheld a prohibition on burials in a town because of the potential health hazard of such burials.<sup>287</sup>

Similarly, in 1860 North Carolina upheld an injunction against use of a Baptist church's graveyard, on a theory that the burial posed an unreasonable hazard to a neighbor.<sup>288</sup> Just the year before, the North Carolina Supreme Court had upheld the use of a public rural cemetery in the town of Washington against a claim that the ceme-

283. PINCKNEY, *supra* note 126, at 4-5.

284. HENRY LAURENS PINCKNEY, "THE SPIRIT OF THE AGE": AN ADDRESS DELIVERED BEFORE THE TWO LITERARY SOCIETIES OF THE UNIVERSITY OF NORTH CAROLINA (Raleigh, J. Gales & Son 1836).

285. *Brick Presbyterian Church v. New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826). New York City's regulation prohibiting interring bodies was upheld, even though the charter had expressly granted the right to inter. *Id.* at 542. Subsequently, *Brick Presbyterian Church* was invoked frequently to justify the broad application of the police power to the regulation of property. See, e.g., *City of N.Y. v. Second Ave. R. Co.*, 32 N.Y. 261, 265 (1865) (citing *Brick Presbyterian Church* in deciding that no private contract can nullify the government's authority to enact regulatory ordinances for the public good); *In re Opening of Albany St.*, 6 Abb. Pr. 273 (N.Y. S. Ct. 1858) (upholding a city ordinance that closed a street); see also *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 547 (1830) (using *Brick Presbyterian Church* to argue in favor of bankruptcy statute passed after contracting).

286. *City Council of Charleston v. Wentworth St. Baptist Church*, 35 S.C.L. (4 Strob.) 306 (S.C. App. Law 1848).

287. *Goddard v. Town of Jacksonville*, 15 Ill. 588, 595 (1854) (citing *Brick Presbyterian Church* for the proposition that even long-existing use of property for sale of liquor may be a nuisance).

288. *Clark v. Lawrence*, 59 N.C. (6 Jones Eq.) 83 (1860) (explaining that water flowed down from the church yard into the neighbor's yard and thus posed a health hazard).

tery would be emotionally disturbing to a neighbor. The Supreme Court thought that public cemeteries were important and did not find the cemetery necessarily morbid:

Public cemeteries, for the orderly and decent sepulture of the dead, are necessary requirements for all populous towns. In fixing sites for them private must yield to public convenience, and the Courts will be particularly careful and not interfere to prevent such establishments, unless the mischief be undoubted and irreparable.<sup>289</sup>

In fact, the North Carolina Supreme Court found that it could be beneficial to think about death, an argument quite similar to that advanced by Justice Story and many others to justify the establishment of rural cemeteries:

If the grounds be arranged and drained, and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion it will not be a nuisance, either public or private. The word nuisance is, of course, used here in its legal sense, and is confined to such matters of annoyance as the law recognizes and gives a remedy for. The unpleasant reflections suggested by having before one's eyes constantly recurring memorials of death, is not one of these nuisances. Mankind would, by no means, agree upon a point of that sort, but many would insist that suggestions thus occasioned would, in the end, be of salutary influence. . . . The nuisance which the law takes cognizance of is such matter as, admitting it to exist, all men, having ordinary senses and instincts, will decide to be injurious.<sup>290</sup>

The court explained the justification of the cemeteries and turned them into a public good:

The cemeteries, which have been established near the principal cities and towns of our country (and which it is the commendable purpose of the Washington corporation to imitate), have sprung from the idea that open space, free ventilation, and careful sepulture, not only prevent such places from becoming nuisances, but make them attractive and agreeable places of resort.<sup>291</sup>

The rural cemetery, thus, owed part of its origin to the increasingly robust ideas of public regulation, to the sense that the city burials threatened health, as well as the constitutional values of order, beautification, and commemoration of death.<sup>292</sup> Those rural cemeteries were near enough to the city so residents could be inspired, but

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289. *Ellison v. Comm'rs of Town of Wash.*, 58 N.C. (5 Jones Eq.) 57, 74 (1859), 1859 WL 2255.

290. *Id.* at 73.

291. *Id.* at 72-73.

292. HARTOG, *supra* note 282, at 71-81; LINDEN, *supra* note 2, at 149-52 (discussing regulation of Boston cemeteries).

far enough away as to not bother the living. Mount Hope, for instance, was far enough away from the city that the city could develop without interfering with the cemetery.<sup>293</sup>

## V. PUBLIC CONSTITUTIONALISM AND THE RURAL CEMETERY

How, then, do the seventy addresses relate to constitutional law? They operated at a high level of generality and collected a constellation of ideas—about individuals, the community, art, nature, Christianity, and charitable organizations—that worked together to form constitutional culture. Even before Lincoln's address at Gettysburg he acknowledged the centrality of cemeteries in fostering a constitutional culture. Lincoln's first inaugural address concludes with an appeal to the sentiments of Union that were nurtured by—among other images—patriot graves. "The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land," Lincoln said, "will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."<sup>294</sup>

What is the vision of constitutionalism in the cemetery dedication addresses? Virtue, community, public versus private, visitors, inclusion, morality—not so much specific legal cases. The addresses reveal how people in the nineteenth century spoke about their relationship to the nation and each other and the bonds that held us together and how we tried to use a common core of principles that helped us as we expanded the nation. The addresses invoked key questions of who was included, how people assumed their places, and who was allowed to rise.

For, as people at the time understood, the Constitution was more than a document interpreted by the Supreme Court that defined and limited federal and state power. The Constitution provided a framework for public debate about a series of abstract but important ideas of law, individualism, the State, and how to hold together a constitutional republic.<sup>295</sup> It helped structure the beliefs of individuals throughout the country on issues of the market, the role of the State in promotion of the economy and of morality, and of the likely future course of the country. Though there were often areas of agreement

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293. WILKINS, *supra* note 274, at 16.

294. ABRAHAM LINCOLN, *First Inaugural Address*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, *supra* note 33, at 215, 224.

295. See, e.g., O. A. Brownson, *Origin and Ground of Government*, 13 U.S. MAG. & DEM. REV. 129 (1843) (discussing "Constitutional Republic"); see also *Mr. Webster's Plea in the Case of the Girard College Will*, 3 NEW ENGLANDER & YALE REV. 89, 99 (1845) (discussing Webster's plea for charities to expand the principles of the "Christian republic" in *Girard v. Vidal*, 43 U.S. (2 How.) 127 (1844)).

across political parties, there were frequently issues of disagreement on the proper lessons to draw from the Constitution about federal intervention in the economy, about the power and desirability of the market, and about the relationship of individuals to the community.

Artist Charles Fraser, who in 1850 delivered the dedication address at Charleston's Magnolia Cemetery,<sup>296</sup> spoke in 1828 at the placement of a corner-stone of a building on the College of Charleston's campus. He spoke about education in much the same way that many spoke about cemeteries. Education had an ability to "unite the sympathies of every heart, and to subdue and harmonize every diversity of opinion."<sup>297</sup> Fraser went on to explain the effect education could have on supporting the Constitution and breathing life into the values of the Constitution.

The Constitution itself is an *admirable* effort of human intellect. Foreigners travelling through our country, and observing the result of this great invisible agent in the uniform, peaceful, and harmonious operations of society, emphatically ask, where is your government? We might as emphatically reply, that it exists in the hearts and the minds of its citizens—that its energies are derived from public opinion—that a rational respect for the laws and institutions of our country, imparts to them that vital principle which pervades and regulates every part of the great republican system.

. . . If we would preserve the ark of our covenant in its original sanctity, let "Wisdom, and Judgment, and Understanding," be the lamps that burn before it.<sup>298</sup>

Fraser spoke of the public nature of the Constitution—not as something that existed only as interpreted by the United States Supreme Court and state courts, but as something that existed in the minds of American citizens. This Constitution was an idea, something created in the hearts and minds of Americans—and supported by national action and by culture.<sup>299</sup> That is the way in which the Constitution appeared in cemetery dedication addresses, as a set of values that the cemeteries would support. For the orators recognized that the rural cemetery's mission was about the living more than the dead.

#### A. *Public Constitutionalism, American Culture, and the Supreme Court*

While the cemetery dedication addresses operated at a very high level of generality, they paralleled ideas made in the pages of the

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296. See FRASER, *supra* note 110.

297. FRASER, *supra* note 94, at 1.

298. *Id.* at 11-12.

299. Fisher, *supra* note 64.

*United States Reports*. One should turn to the opinions of two cemetery orators, Justice Joseph Story and Justice John McLean, for examples of how general appeals to constitutional values in dedication addresses paralleled the ideas in formal law. To take three of many examples from Justice Story's work, one sees in his concurrence in *Dartmouth College* a focus on the charter rights of the College, which Story preserved through an expansive reading of the Constitution's Contracts Clause. A decade later in *Van Ness v. Pacard*, Story used the imagery of improvement of the American wilderness to support a claim by a tenant that he was entitled to remove a structure he had built on his landlord's property when the lease ended. The landlord wanted, in essence, to keep the building that the tenant had put on the property. Story faced a question of whether to apply the English common law here, which supported the landlord. Story pointed to the wild conditions of the land in early America that counseled in favor of a rule that encouraged tenants to build structures on the land. That is, if the land was going to be improved, tenants needed to have the opportunity to recapture their investments by moving buildings when their lease ended.<sup>300</sup> But even beyond that economic argument in favor of a rule that encouraged improvement, Story thought that another rule applied as well, which allowed the tenant to remove structures built for trade.<sup>301</sup> Story was shaping rules to encourage development of property, just as the cemeteries reflected Americans' settlement of the land. The third example is Story's dissent in *Charles River Bridge v. Warren Bridge*, where Story emphasized the harm that comes from the failure to protect the charter rights of corporations.<sup>302</sup> Like cemeteries, robust protection of property was both a sign of civilization and an encouragement to further civilization.

A similar story could be told about Justice McLean, who dissented in *Charles River Bridge*<sup>303</sup> and also in several other later cases that too narrowly construed charter rights in his opinion.<sup>304</sup> In those dissents, McLean broadly construed corporate charters. He also construed a bank charter broadly to protect against subsequent state regulation in his majority opinion in *Piqua Branch of State Bank of*

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300. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 145 (1829) ("The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favour any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection?").

301. *Id.* at 146.

302. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (Story, J., dissenting).

303. *Id.* at 554 (McLean, J., dissenting).

304. *Richmond, Fredericksburg, & Potomac R.R. Co. v. La. R.R. Co.*, 54 U.S. (13 How.) 71, 83 (1851); *W. River Bridge v. Dix*, 47 U.S. (6 How.) 507, 536 (1848).



*Ohio v. Knoop*.<sup>305</sup> McLean's dissent in *Groves v. Slaughter*, a case questioning whether slaves were articles of commerce under the interstate Commerce Clause, illustrates his broad construction of Congress's Commerce Clause power.<sup>306</sup> Moreover, McLean's dissent in *Dred Scott* illustrates his anti-slavery attitudes and his sense of moral progress that would limit slavery to places where there was an affirmative act supporting it.<sup>307</sup> As with Justice Story, Justice McLean's jurisprudence correlates with the rural cemetery movement. The support of cemeteries was a part of a Whig world view of order and of economic and moral advance.

Yet, the pages of appellate reports were not the only places where such conflicting visions of the Constitution appeared. The contest appeared in Congress and state houses, as well as newspapers, in a period when there was dramatic development of ideas about the proper role of the government, private corporations, and individual conceptions of morality in the evolution of constitutional ideas. As the last several generations of historians of the Civil War have demonstrated, the war itself was about the relationship of property, the market, individual humanity, and the State's role in governing the relationship between property and humanity.<sup>308</sup>

The community participated in the celebrations. Thousands attended Story's speech; the local militia company attended the dedication of Syracuse's Oakwood Cemetery in 1860,<sup>309</sup> though the processions at the dedications set them apart from the typical democratic assembly. William Foster began his 1860 address at the Blossom Hill Cemetery in Concord with an observation about that differences between more common democratic assemblies and the cemetery dedication. "We are assembled to-day for the performance of no ordinary duty. Not with pageantry, with music, banners and rejoicing shouts, but with reverent steps and decorous gravity we have come to this beautiful seclusion."<sup>310</sup>

The oratory worked in conjunction with the voice of the graves in the cemeteries to help create a more moral community—and it was this culture of moralism that would work to bring about reform and

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305. *Piqua Branch Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369, 376 (1853).

306. *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 503-05 (1841).

307. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 535-36 (1857) (McLean, J., dissenting).

308. See, e.g., AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998) (discussing ideas of market and contract as slavery was attacked before and during the Civil War).

309. OAKWOOD CEMETERY, *supra* note 23, at 40 (listing order of procession).

310. WILLIAM L. FOSTER, *RELIGIOUS SERVICES AND ADDRESS OF WILLIAM L. FOSTER, AT THE CONSECRATION OF BLOSSOM HILL CEMETERY, CONCORD, N. H., FRIDAY, JULY 13, 1860* (Concord, McFarland & Jenks 1860).

to assist in constitutional development. Georgia's Chief Justice Joseph Henry Lumpkin spoke of the power of sentiment in 1850 at the South-Carolina Agricultural fair:

*Benevolence*, instead of *malevolence*, is beginning to be the grand master-spirit and motive-power of the world. All working for the good of all—this is society—all else is savagism. Associated man regulating the pursuits of individual man—not by law, nor sword, nor thumbscrew, nor bullet, nor bayonet—but by precept and example, moral suasion, personal influence, and the law of good neighborhood.<sup>311</sup>

One of the fullest connections of the cemetery to the constitutional ideals came in John F. Norton's address on July 4, 1859, "The Home of the Ancient Dead Restored," at the rededication of the Athol, Massachusetts Cemetery. Norton looked back on the long movement that led to the Revolution, back to the Puritans rebelling against the authority of the church in the seventeenth century. He found the values that made the Revolution, such as "[t]he spirit of the men and women that entered this wilderness and converted it into a fruitful field, their honesty of purpose, their firm resolve, their enlarged views, their sound judgment, their readiness to sacrifice self for the common good, their high moral courage, their faith in God . . ."<sup>312</sup> The cemetery connected the people who made the Revolution with his audience and Norton used that connection to urge further action "in the name of civilization, patriotism and religion."<sup>313</sup> Norton explained the reverence owed to the past as well as the lessons the future generations will draw from the cemetery. He left it up to future generations to extend the Revolution's legacy.<sup>314</sup>

*B. Public Constitutionalism at Gettysburg:  
Cemetery Ridge, Edward Everett, and Abraham Lincoln*

This story of public constitutional values and the rural cemetery should conclude at Gettysburg, where on July 3, 1863, on Cemetery Ridge, the United States soldiers put into operation the principles of perpetual Union that had been so carefully nurtured by the Whigs and then Republicans.<sup>315</sup> Much of the decisive battle, which was criti-

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311. JOS. H. LUMPKIN, AN ADDRESS DELIVERED BEFORE THE SOUTH-CAROLINA INSTITUTE, AT ITS SECOND ANNUAL FAIR, ON THE 19TH NOVEMBER, 1850 51-52 (Charleston, Walker & James 1851).

312. NORTON, *supra* note 120, at 14.

313. *Id.* at 20.

314. *Id.* at 21.

315. See, e.g., ERIC S. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1972) (discussing ideas of the early Republican party, especially focusing on free labor ideology); Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5, 5-53 (1978).

cal to preserving the Union, was fought along Cemetery Ridge,<sup>316</sup> named after the Ever Green Cemetery that was atop nearby Cemetery Hill. Ever Green had been dedicated eight years earlier, in 1855.<sup>317</sup> The dedication addresses for the rural cemeteries and the cemeteries themselves had contributed to the sentiments of constitutional Union. Improbably, the Ever Green Cemetery that was part of a movement to support and advance the constitutional values that were being tested in the early days of July 1863 was part of the battle. The U.S. soldiers positioned on Cemetery Ridge beat back Pickett's charge<sup>318</sup> and in doing so they put into operation a new constitutional vision of equality and democracy. Those soldiers had more to say about how to interpret the Constitution than Supreme Court Chief Justice Roger B. Taney, John C. Calhoun, or Jefferson Davis.

A few months later, on November 19, politicians, reporters, military officials, and patriotic Americans assembled to hear another cemetery dedicated in that hamlet. One of the most commonly told stories of those ceremonies was of some speaker who droned on for two and a half hours before Lincoln's brief speech.<sup>319</sup> Though his name may be rarely remembered, that speaker, Edward Everett, was famous in his era for serving as Senator from Massachusetts and as President of Harvard.<sup>320</sup> Everett's was the very last dedication address before Lincoln redefined the genre. But before that address Everett had spoken about the respective roles of the State and individuals. His 1824 Phi Beta Kappa address at Harvard—given in the presence of General LaFayette, the French hero of the American Revolution who was in the United States touring the country fifty years after the Revolution<sup>321</sup>—was about the place that a well-governed state could play in raising the moral level of a people.<sup>322</sup> Everett, as a speaker, thus connected the generation of the Revolution to that of the Civil War. He linked the Constitution and the State it helped establish to the goal of human progress. That Constitution then further

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316. ALLEN C. GUELZO, *GETTYSBURG: THE LAST INVASION* 163-65, 241-60 (2013) (discussing centrality of Cemetery Ridge to the battle).

317. EVER GREEN, *supra* note 119, at 2-3.

318. GUELZO, *supra* note 316, at 388-426.

319. WILLS, *supra* note 54, at 34-35; *see also* JOHNSON, *supra* note 54 (identifying Lincoln's evolving emphasis on Union, sacrifice, and race in the drafts of the address).

320. WILLS, *supra* note 54, at 24, 35 (noting that the dedication was moved from October to November to accommodate Everett's schedule and that Everett was given billing on the program as the orator and that Lincoln's name was not even present on the program).

321. 1 A. LEVASSEUR, *LAFAYETTE IN AMERICA IN 1824 AND 1825: OR, JOURNAL OF A VOYAGE TO THE UNITED STATES* 40-42 (John D. Goodman trans., Philadelphia, Carey & Lea 1829) (mentioning Everett's address).

322. EDWARD EVERETT, *AN ORATION PRONOUNCED AT CAMBRIDGE, BEFORE THE SOCIETY OF PHI BETA KAPPA, AUGUST 27, 1824* (N.Y., J.W. Palmer 1824).

linked individuals to the State. It was necessary to put the whole system together. One piece could not accomplish the purpose of human society.

Where the cemetery dedication addresses before the Civil War were about the role of cemeteries in promotion of moral values, such as patriotism and religion, Everett's speech was about the duty owed to the people buried in Gettysburg, the War itself, and ways to put the country back together again. Everett's primary theme was the debt owed to the U.S. soldiers buried in the National Cemetery and to the rest of the soldiers. This was, after all, a tribute. The address began with reference to the graves of patriots and the "eloquent silence of God and Nature" in the cemetery.<sup>323</sup> Then he turned to the burial practices of ancient Athens, where war heroes were buried at public expense, to establish an ancient and honorable lineage for this national cemetery.

Everett called upon images of sentiment and patriotism to consecrate the cemetery. "As my eye ranges over the fields whose sods were so lately moistened by the blood of gallant and loyal men, I feel, as never before, how truly it was said of old that it is sweet and becoming to die for one's country," he said.<sup>324</sup> Then he turned to just how critical the situation was for the United States at the time of the battle. The consequences would have been dire, indeed, he said, if "those who sleep beneath our feet, and their gallant comrades who survive . . . , had failed in their duty on those memorable days."<sup>325</sup> Everett told the story of the entire War; much of the address was about the campaign of 1863, with a detailed description of the battle of Gettysburg that highlighted the heroism of the Union soldiers and the debt owed to them for protecting the Northern population.

Then he turned from the history of battle to larger questions about the issues at stake in the War. Everett used the occasion to plead that case of the United States and our Constitution against the Confederate rebels. He quoted Jefferson Davis's statement that the United States was "the best government ever instituted by man . . . under which the people have been prosperous beyond comparison . . . ."<sup>326</sup> While the rebels claimed to be the successors to the American Revolutionaries, Everett spoke of their crime against the Constitution and labeled their actions treason.<sup>327</sup> He rebutted what he called the Confederacy's "wretched sophistries" of their interpretation of the Consti-

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323. EDWARD EVERETT, ADDRESS OF HON. EDWARD EVERETT, AT THE CONSECRATION OF THE NATIONAL CEMETERY AT GETTYSBURG, 19TH NOVEMBER, 1863, at 29 (BOSTON, LITTLE, BROWN & CO. 1864).

324. *Id.* at 33.

325. *Id.*

326. *Id.* at 62 (quoting Jefferson Davis).

327. *Id.* at 64.

tution.<sup>328</sup> Where southerners believed that the Constitution set up sovereign states, Everett responded that the Constitution's preamble says it is established by "the People of the United States."<sup>329</sup> Everett presented a concise version of the United States' constitutional argument that the Union was perpetual and that states could not secede.<sup>330</sup>

The address called for restoration of the Union. A truce with the Confederacy would be a disaster for the United States, for the people loyal to the United States in the South, and for the enslaved people of the South.<sup>331</sup> Everett wanted restoration of the Union, and he concluded with a call for reconciliation and an argument that reconciliation was possible.<sup>332</sup> Everett drew on many examples from European history stretching back hundreds of years.<sup>333</sup> This was a deeply patriotic address, which sought support for the cause by celebrating the soldiers and also looking forward to a restored Union. Because of the deeds of the patriots buried at Gettysburg and those who survived, those in the audience that day felt a "new bond of union."<sup>334</sup>

What followed Everett's lengthy address was different. Lincoln spoke in broad terms about the sacrifices at Gettysburg and then appealed to broad principles, such as the "new birth of freedom."<sup>335</sup> Lincoln was the visionary who spoke in general and broad terms and helped remake American democracy. Lincoln's address appealed to the spirit of the Constitution, much as the antebellum dedication addresses had. Lincoln remade the genre, but also remade our Constitution.<sup>336</sup> He legitimized the idea of equality and of self-government that have framed the hopes of our nation and our courts ever since. None of the earlier speeches had the eloquence or the gravity of Lincoln's words at Gettysburg. But many of them had tapped into—and

328. *Id.* at 69.

329. *Id.* at 66 (quoting U.S. CONST. pmb.).

330. *Id.* at 79-81.

331. *Id.* at 70.

332. *Id.*

333. *See, e.g., id.* at 71-79 (discussing examples of European wars and later settlement of them).

334. *Id.* at 81.

335. ABRAHAM LINCOLN, *Dedicatory Address of President Lincoln*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, *supra* note 33, at 536.

336. WILLS, *supra* note 54, at 90, 125-32. There remains the question whether the Address represented a signal about the evolution of ideas or actually caused a shift in those ideas. *But see* Linda Selzer, *Historicizing Lincoln: Garry Wills and the Canonization of the "Gettysburg Address,"* 16 RHETORIC REV. 120-137 (1997). *Cf.* JOHNSON, *supra* note 54 (linking shifts in constitutional ideas of Union and equality to Lincoln's Address). The question that Selzer raises about Wills' attribution of causation to Lincoln's Address parallels questions this Article has raised about pre-war cemetery dedication addresses' contribution to constitutional culture. At the very least, they are gauges of constitutional values.

helped create—the Romantic Era appeals to sentiment that propelled Lincoln and his supporters towards war to preserve the Union—and to the Emancipation Proclamation.<sup>337</sup>

It was on the battlefield at Gettysburg and at many other previously obscure places like Antietam, Chancellorsville, Cold Harbor, and Petersburg, that Americans put into practice their constitutional ideals. At those places, soldiers showed that the values so cherished in cemetery dedication addresses—of order under law, Union, and economic and moral progress—were part of a large world. That world bound humans to each other as they sought to improve upon nature and as they created an ordered, commercial republic governed by sentiments and by law.

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337. ABRAHAM LINCOLN, *Emancipation Proclamation*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, *supra* note 33, at 368-70.

## APPENDIX

Published Dedication Speeches, 1831-1860  
Reverse Chronological Order

1. WILLIAM L. FOSTER, RELIGIOUS SERVICES AND ADDRESS OF WILLIAM L. FOSTER, AT THE CONSECRATION OF BLOSSOM HILL CEMETERY, CONCORD, N. H., FRIDAY, JULY 13, 1860 (Concord, McFarland & Jenks 1860).
2. REVEREND J.C. BODWELL, ADDRESS DELIVERED AT THE CONSECRATION OF THE LAKE GROVE CEMETERY, HOLLISTON, MASS. JUNE 1, 1860 (Holliston, 1860).
3. ORGANIZATION AND DEDICATION CEREMONIES OF LAKE-VIEW CEMETERY (Jamestown, N.Y., Sacket & Bishop 1860).
4. William J. Bacon, *Address of William J. Bacon* (Nov. 3, 1859) in THE HISTORY, INCORPORATION, RULES AND REGULATIONS OF OAKWOOD CEMETERY 27-39 (Syracuse, 1860).
5. JAMES C. CONKLING, ADDRESS DELIVERED BY JAMES C. CONKLING AT THE DEDICATION OF OAK RIDGE CEMETERY, SPRINGFIELD, ILLINOIS (n.p. 1860).
6. JOHN F. NORTON, THE HOME OF THE ANCIENT DEAD RESTORED: AN ADDRESS DELIVERED AT ALTHOL ON JULY 4, 1859 (Althol Depot, Rufus Putnam 1859).
7. A.D. MAYO, THE AMERICAN CEMETERY: AN ADDRESS DELIVERED AT THE DEDICATION OF GREEN HILL CEMETERY AT AMSTERDAM, MONTGOMERY CO., N.Y., ON WEDNESDAY, SEPTEMBER 1, 1858 (Amsterdam, N.Y., Recorder Office 1858).
8. WILLIAM WILEY, THE MISSION CEMETERY AND THE FALLEN MISSIONARIES OF FUH CHAU, CHINA: WITH AN INTRODUCTORY NOTICE OF FUH CHAU AND ITS MISSIONS (N.Y., Carlton & Porter 1858).
9. John Waugh, *Address at the Consecration of the Riverside Cemetery* (June 28, 1858) in RULES AND REGULATIONS OF RIVERSIDE CEMETERY, AT GOUVERNEUR, ST. LAWRENCE COUNTY, N.Y.

WITH THE CONSECRATORY EXERCISES (Ogdensburgh, Hitchcock, Tillotson, and Stilwell 1858).

10. A.D. GILLETTE, THE WOODLANDS CEMETERY, AT CAMBRIDGE, N.Y., WITH HISTORICAL SKETCHES, AND AN ADDRESS OF REV. A.D. GILLETTE, D.D., DELIVERED AT THE DEDICATION, JUNE 2, 1858 (Troy, N.Y., A.W. Scribner 1858).
11. John McLean, *Address of John McLean in THE CINCINNATI CEMETERY OF SPRING GROVE*, REPORT FOR 1857 (Cincinnati, Ohio, C.F. Bradley 1857).
12. James W. Dennis, *Address of James Dennis at the Consecration of the Evergreen Cemetery (July 26th, 1857)*, in CONSECRATION OF "EVERGREEN CEMETERY" (Stoughton, Mass., 1857).
13. O.S. Williams & Edward North, *Addresses of O.S. Williams and Edward North*, in ADDRESSES DELIVERED AT THE DEDICATION OF THE CLINTON CEMETERY (Utica, N.Y., Roberts 1857).
14. James F. Chalfant, *Address of Rev. James Chalfant*, in REPORT OF THE TRUSTEES OF OAK DALE CEMETERY TO THE MAYOR AND TRUSTEES OF THE CORPORATION OF URBANA (Urbana, Ohio, C.B. Flood 1856).
15. A.N. Littlejohn, ADDRESS DELIVERED AT THE DEDICATION OF THE NEW GROUNDS OF THE EVERGREEN CEMETERY OF NEW HAVEN, JULY 29TH, 1856 (New Haven, S. Babcock 1856).
16. J.H.C. Dosh, *Address*, in FIRST ANNOUNCEMENT OF EVER GREEN CEMETERY, GETTYSBURG, PA., WITH AN ADDRESS DELIVERED AT THE OPENING CEREMONIES BY REV. J.H.C. DOSH, AND A DISCOURSE DELIVERED AT THE LAYING OF THE CORNER STONE OF GATEWAY AND LODGES AT CEMETERY (Gettysburg, H.C. Neinstedt 1855).
17. W.R.G. Mellen, THE CHRISTIAN IDEA OF DEATH: AN ADDRESS AT THE CONSECRATION OF OAK GROVE CEMETERY (Gloucester, Advertiser Press 1856) (June 29, 1855).
18. F. W. Shelton, *Address*, in SERVICES AT THE DEDICATION OF GREEN MOUNTAIN CEMETERY, MONTPELIER, VT., SEPTEMBER 15 1855,



WITH THE RULES AND REGULATIONS (Montpelier, E. P. Walton, Jr.1855).

19. John Thompson, *Address, in* THE POUGHKEEPSIE RURAL CEMETERY, ITS BY-LAWS, RULES AND REGULATIONS AND THE DEDICATION CEREMONIES (Poughkeepsie, Platt & Schram's Steam Prtg. Establishment 1854).
20. DEDICATION OF THE OAKLANDS CEMETERY: TOGETHER WITH THE CHARTER AND BY-LAWS (West Chester, Pa., Register & Examiner Steam Press 1854).
21. JOHN A. ALBRO, ADDRESS AT THE CONSECRATION OF THE CAMBRIDGE CEMETERY (Cambridge, Mass., Metcalf & Co. 1854) (Nov. 1, 1854).
22. Rev. Butler, *Address of Rev. Doct. Butler* (Aug. 1, 1854) *in* SKETCH AND DEDICATION OF GLENWOOD CEMETERY, WASHINGTON, D.C., AUGUST 1ST, 1854 (Washington, D.C., 1854).
23. RALPH WALDO EMERSON, *Consecration of Sleepy Hollow Cemetery, in* 11 THE COMPLETE WORKS OF RALPH WALDO EMERSON: MISCELLANIES 430 (Boston & N.Y., Houghton, Mifflin & Co.1904).
24. ADDRESS OF THE REV. DAVID MAGIE AND OTHER SERVICES DEDICATORY OF "THE EVERGREEN CEMETERY," TOGETHER WITH THE CERTIFICATE OF INCORPORATION, AND THE RULES AND REGULATIONS THEREOF (Elizabethtown, N.J., 1853).
25. SAMUEL WOLCOTT, ADDRESS DELIVERED AT THE CONSECRATION OF ROCK HILL CEMETERY IN FOXBOROUGH, MASS. (Providence, 1853).
26. H.D. WALKER, ADDRESS DELIVERED AT THE CONSECRATION OF MOUNT VERNON CEMETERY, ABINGTON, MASS., MAY 31, 1853 (Boston, A. Mudge 1853).
27. CHARLES F. MAYER, SKETCH OF LOUDON PARK CEMETERY: ITS DEDICATION, AND ADDRESS OF THE HON. CHARLES F. MAYER, DELIVERED ON THAT OCCASION (Baltimore, The Printing Office 1853).

28. Green Kendrick, *Address, in* THE RIVERSIDE CEMETERY, AT WATERBURY, CONN., ITS ARTICLES OF ASSOCIATION, BY-LAWS AND RULES AND REGULATIONS, WITH THE DEDICATION ADDRESS, &C. DEDICATED, SEPT. 24TH, 1853 (Waterbury, 1853).
29. LAUREL GROVE CEMETERY!, AN ACCOUNT OF ITS DEDICATION, WITH THE POEM OF THE HON. ROBERT M. CHARLTON, AND THE ADDRESS OF THE HON. HENRY R. JACKSON, DELIVERED ON THE 10TH NOVEMBER, 1852, TO WHICH ARE ADDED THE ORDINANCES ESTABLISHING AND REGULATING THE CEMETERY (Savannah, City Council 1852).
30. F.D. Huntington, *Address, in* MOUNT HOPE CEMETERY IN DORCHESTER AND WEST ROXBURY JUNE 24, 1852 (Boston, Crosby, Nichols & Co. 1852).
31. Robert Crowell, ADDRESS, DELIVERED OCTOBER 27TH, 1852, AT THE CONSECRATION OF THE SPRING STREET CEMETERY, ESSEX, MASS. (Boston, B. Marsh 1853).
32. George A. Lyon, *Address, in* FIRST REPORT OF THE MANAGERS OF THE ERIE CEMETERY, TOGETHER WITH THE ACT OF INCORPORATION (Erie, Pa., The Gazette Office 1852).
33. Cyrus Mason, *Address, in* THE DALE CEMETERY, (AT CLAREMONT, NEAR SING-SING), ITS INCORPORATION, RULES AND REGULATIONS, AND THE DEDICATION ADDRESSES 1852 (N.Y., C.C. Childs 1852).
34. GEORGE EDWARD ELLIS, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE WOODLAWN CEMETERY IN CHELSEA AND MALDEN (Boston, John Wilson & Son 1851).
35. E. B. WILSON, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE RIVERSIDE CEMETERY IN GRAFTON APRIL 29, 1851 (Boston, J. Wilson & Son 1851).
36. SPENCER M. RICE, ADDRESS, DELIVERED BEFORE THE SAUQUOIT VALLEY CEMETERY ASSOCIATION: AT THE CONSECRATION OF LAWN HILL CEMETERY, OCTOBER 16, 1851 (Utica, N.Y., H.H. Curtiss 1851).

37. HIRAM WILEY, CONSECRATION OF CEDAR GROVE CEMETERY (New London, Conn., D.S. Ruddock 1851).
38. WILLIAM GILMORE SIMMS, THE CITY OF THE SILENT, A POEM, DELIVERED AT DEDICATION OF MAGNOLIA CEMETERY (Charleston, Walker & James 1850).
39. CHARLES C. SHACKFORD, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE PINE GROVE CEMETERY (Lynn, Mass., T. Herbert 1850).
40. CHARLES FRASER, ADDRESS DELIVERED ON THE DEDICATION OF THE MAGNOLIA CEMETERY, ON THE 19TH OF NOVEMBER, 1850 (Charleston, Walker and James 1850).
41. FREDERIC AUGUSTUS WHITNEY, AN ADDRESS DELIVERED AT THE CONSECRATION OF EVERGREEN CEMETERY, BRIGHTON, WEDNESDAY, AUGUST 7, 1850 (Boston, John Wilson 1850).
42. THOMAS DAWES, AN ADDRESS DELIVERED ON SUNDAY EVENING, JULY 7TH, 1850 AT THE CONSECRATION OF THE RIVER-SIDE CEMETERY IN FAIRHAVEN, MASSACHUSETTS (New Bedford, Mass., B. Lindsey, 1850).
43. FREDERIC J. GOODWIN, AN ADDRESS, DELIVERED AT THE DEDICATION OF THE INDIAN HILL CEMETERY, MIDDLETOWN, CONN. (Middletown, Conn., C.H. Pelton 1850).
44. AN ADDRESS BY HENRY NEILL & A POEM BY OLIVER WENDELL HOLMES (Pittsfield, Mass., Axtel, Bull, & Marsh 1850) (Pittsfield Rural Cemetery).
45. C. Edwards Lester, *Address, in* THE MOUNTAIN GROVE CEMETERY ASSOCIATION (Bridgeport, Conn., William S. Pomeroy 1853).
46. DAVID BUEL, AN ADDRESS DELIVERED AT THE CONSECRATION OF OAKWOOD CEMETERY (Troy, N.Y., John F. Prescott 1850).
47. JOHN B. BAILEY, AN ADDRESS, PREPARED TO BE DELIVERED AT THE CONSECRATION OF MOUNT HOPE CEMETERY, IN

ATTLEBOROUGH, JULY 2, 1850 (Taunton, Mass., C.A. Hack 1851).

48. REPORT OF THE TRUSTEES OF GREEN LAWN CEMETERY; WITH THE ARTICLES OF ASSOCIATION, THE BY-LAWS, REGULATIONS, AND THE DEDICATION ADDRESSES (Columbus, Ohio, Ohio State Journal 1849).
49. DANIEL HUNTINGTON, ADDRESS DELIVERED AT THE CONSECRATION OF THE UNION CEMETERY, AT OAK GROVE, NORTH BRIDGEWATER, MASS., MAY 21, 1849 (1849).
50. OLIVER BALDWIN, ADDRESS DELIVERED AT THE DEDICATION OF THE HOLLY-WOOD CEMETERY: ON MONDAY, THE 25TH JUNE, 1849 (Richmond, Macfarlane & Fergusson 1849).
51. GEORGE PUTNAM, AN ADDRESS DELIVERED BEFORE THE CITY GOVERNMENT AND CITIZENS OF ROXBURY, AT THE CONSECRATION OF THE CEMETERY AT FOREST HILLS, JUNE 28, 1848 (Roxbury, J.G. Torrey 1848).
52. INCREASE N. TARBOX, AN ADDRESS BEFORE THE CITIZENS OF FRAMINGHAM, AND THE NEIGHBORING TOWNS, AT THE CONSECRATION OF THE CEMETERY IN SAID TOWN, OCT. 13, 1848 (Boston, Joseph L. Hallworth 1849).
53. J.R. ARNOLD, AN ADDRESS DELIVERED AT THE OPENING OF THE LINWOOD CEMETERY, COLCHESTER, CONN., JUNE, 1848 (Colchester, Conn. 1850).
54. EDWARD P. HUMPHREY, AN ADDRESS DELIVERED ON THE DEDICATION OF THE CAVE HILL CEMETERY, NEAR LOUISVILLE: JULY 25, 1848 (Louisville, Courier Job-Room 1848).
55. D.D. Barnard, *Address, in* ALBANY RURAL CEMETERY ASSOCIATION: ITS RULES, REGULATIONS, &C., WITH AN APPENDIX (Albany, C. Van Benthuysen & Co. 1846).
56. JOHN MCLEAN, ADDRESS DELIVERED ON THE CONSECRATION OF THE SPRING GROVE CEMETERY, NEAR CINCINNATI, AUGUST 20TH, 1845 (Cincinnati, Daily Atlas Office 1845).

57. DEDICATION OF MOUNT HEBRON CEMETERY, IN WINCHESTER, VIRGINIA, JUNE 22, 1844; THE ACT OF INCORPORATION BY THE LEGISLATURE OF VIRGINIA IN 1844, AND THE CONSTITUTION AND BY-LAWS OF THE MOUNT HEBRON CEMETERY COMPANY (Winchester, Republican Office 1845).
58. David Damon, *Address, in* AN ADDRESS DELIVERED AT THE CONSECRATION OF THE NEW CEMETERY IN WEST CAMBRIDGE, MASS., JUNE 14TH, 1843 (Somerville, Mass., Edmund Tufts 1843).
59. JAMES BUNKER CONGDON, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE OAK GROVE CEMETERY, IN NEW-BEDFORD, OCTOBER 6TH, 1843 (New Bedford, Mass., Benjamin Lindsey 1844).
60. BELLAMY STORER, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE LINDEN GROVE CEMETERY, COVINGTON, KENTUCKY, SEPTEMBER 11, 1843 (Cincinnati, E. Morgan & Co. 1843).
61. JOSIAH CLARK, AN ADDRESS: DELIVERED AT THE CONSECRATION OF THE RUTLAND RURAL CEMETERY, OCTOBER 7, 1842 (West Brookfield, Mass., C.A. Mirick 1843).
62. JONATHAN F. STEARNS, RESPECT FOR THE REMAINS OF THE DEAD: AN ADDRESS DELIVERED AT THE CONSECRATION OF OAK HILL CEMETERY, IN NEWBURYPORT, JULY 21, 1842 (Newburyport, A. Augustus Call 1842).
63. WILLIAM BOURN OLIVER PEABODY, ADDRESS DELIVERED AT THE CONSECRATION OF THE SPRINGFIELD CEMETERY: SEPTEMBER 5TH, 1841 (Springfield, Mass., Wood & Rupp 1841).
64. AMOS BLANCHARD, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE LOWELL CEMETERY, JUNE 20, 1841 (Lowell, Leonard Huntress 1841).
65. DANIEL APPLETON WHITE, AN ADDRESS DELIVERED AT THE CONSECRATION OF THE HARMONY GROVE CEMETERY, IN SALEM, JUNE 14, 1840 (Salem, The Gazette Press 1840).

66. JOHN PENDLETON KENNEDY, THE DEDICATION OF GREEN MOUNT CEMETERY, JULY 13TH, 1839 (Baltimore, Woods & Crane 1839).
67. HENRY LAURENS PINCKNEY, REMARKS ADDRESSED TO THE CITIZENS OF CHARLESTON, ON THE SUBJECT OF INTERMENTS, AND THE POLICY OF ESTABLISHING A PUBLIC CEMETERY BEYOND THE PRECINCTS OF THE CITY (Charleston, W. Riley 1839).
68. SAMUEL BUEL, ADDRESS DELIVERED ON THE OCCASION OF THE OPENING OF THE MARSHALL CEMETERY, MICHIGAN, MAY 2, 1839 (Marshall, H.C. Bunce 1839).
69. PHARCELLUS CHURCH, AN ADDRESS DELIVERED AT THE DEDICATION OF MOUNT HOPE CEMETERY, ROCHESTER, OCT. 2, 1838; AND REPEATED BY REQUEST BEFORE THE ROCHESTER ATHENAEUM AND YOUNG MEN'S ASSOCIATION (Rochester, David Hoyt 1839).
70. JOSEPH STORY, AN ADDRESS DELIVERED ON THE DEDICATION OF THE CEMETERY AT MOUNT AUBURN, SEPTEMBER 24, 1831 (Boston, Joseph T. & Edward Buckingham 1831).

